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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

AT THE
TERMS OF SEPTEMBER A. D. 1917,
JANUARY, APRIL AND SEP-
TEMBER, A. D. 1918

E. T. WELLS, REPORTER

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JUSTICES OF THE COURT DURING THE TIME OF THESE REPORTS

JAMES E. GARRIGUES, *Chief Justice.*

Justices—

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JAMES H. TELLER
MORTON S. BAILEY
GEORGE W. ALLEN
HASLETT P. BURKE
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Clarence E. Morley—Second District.....	Denver
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Jesse C. Wiley—Twelfth District.....	Del Norte
Louis C. Stephenson—Thirteenth District.....	Fort Morgan

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Cases Argued and Determined
In
The Supreme Court of the
State of Colorado

At September Term, A. D. 1917

No. 8666.

**BESSEMER IRRIGATING DITCH COMPANY v. OXFORD FARMERS'
DITCH COMPANY ET AL.**

1. **APPEAL FROM ERROR**—*Presumptions*, that the court below disregarded incompetent evidence.
2. **FINDING ON INSUFFICIENT EVIDENCE**. Where, disregarding incompetent evidence heard below, what remains in the record is insufficient to support the decree it will be reversed.
3. **WATER RIGHTS**—*Change of Point of Diversion*. There being no evidence that others would be injuriously affected by the change sought, a decree denying it was reversed and the court below directed to order it.

Error to Fremont District Court, Charles A. Wilkin, Judge.

Messrs. DEVINE & PRESTON & WALDO and STUMP, for plaintiff in error.

Messrs. FRED A. SABIN & JOHN H. VORHEES, for defendant in error.

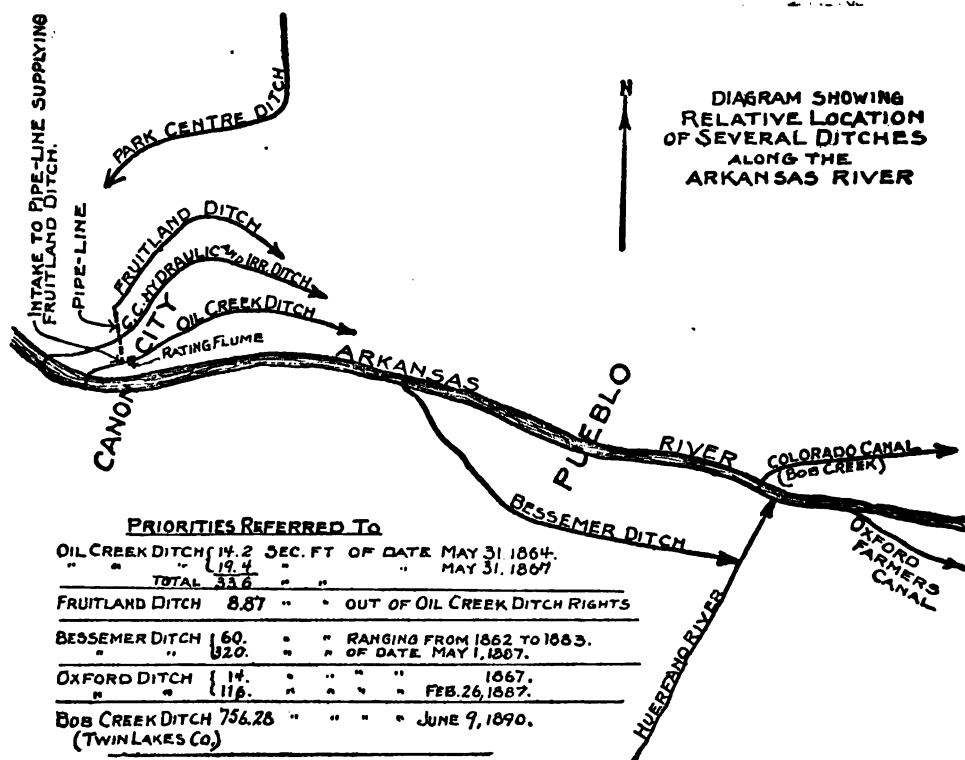
Mr. Justice Garrigues delivered the opinion of the court.

THIS proceeding was brought under the session laws of 1903, p. 278, to obtain a decretal order permitting a change

in the point of diversion of 8.87 cubic feet of water per second on the Arkansas river from the headgate of the Oil Creek ditch into the headgate of the Bessemer ditch.

The statute provides that every person desirous of changing in whole or in part, the point of diversion of his right to the use of water from any natural stream shall petition to the proper court, praying that the change be granted; that the court shall, after notice, hear evidence to determine whether the proposed change will injuriously affect the vested rights of others in and to the use of the water in the stream, and unless it appears from the evidence that such change will so affect the vested rights of others, the court shall enter a decree permitting the change.

The accompanying map shows, as far as pertinent, the relative location of the ditches and headgates upon the stream.



The court refused to make the decretal order permitting the change, and dismissed the petition upon the ground that it would injuriously affect the vested rights of others, and that is the only question involved.

The Oil Creek ditch headgate is in water district 12, and the Bessemer ditch headgate, about 30 miles below in water district No. 14. In the general adjudication decree entered in Fremont county in water district 12, in February, 1894, the Oil Creek ditch was awarded Arkansas river priorities of an early date, aggregating 33.6 cubic feet per second, for general irrigation purposes.

The Fruitland, a mutual ditch company, was organized in 1893, and the lands under it lie above the Oil Creek ditch; the Hydraulic ditch and lands under it lie between the Fruitland and Oil Creek ditches. The Fruitland made no independent appropriation of its own from the stream, but relied upon supplying its stockholders by purchasing the use of water that had theretofore been beneficially applied. In 1893 it purchased from the Oil Creek ditch company 8.87 cubic feet per second of the latter's decreed appropriation, and installed a pumping plant in the Oil Creek ditch shortly below the headgate, and in 1896 began pumping the water into its ditch. In 1911, to obviate the expense of pumping, it obtained the use of 16 second feet of decreed water from the city of Canon City for its consumers and ceased to pump or use the Oil Creek appropriation. This continued from 1911 until 1913 when, having no further use for the Oil Creek ditch appropriation, it sold its right to the Bessemer ditch company, plaintiff herein, and the latter company, desiring to change the point from which the diversion was originally made when the water was first applied to a beneficial use, instituted this proceeding, the Oil Creek Ditch Company having consented to the transfer. During the three years from 1911 to 1913, when the Fruitland was not using its portion of the Oil Creek ditch appropriation, it paid the Oil Creek ditch assessments thereon. No question of abandonment is claimed or involved. After the Fruitland ceased pumping, this water was permitted either to remain in the stream or was tailed back into the river through the

Oil Creek ditch and used by other appropriators in the order of their priorities.

Garrigus, J. (after stating the facts as above). Upon careful examination of this case, we have reached the conclusion that the transfer should have been allowed. Defendants in error invoke the rule that we ought not to interfere with the finding and decree of the court where the evidence is in substantial conflict, and that it will be presumed that the court considered only proper and competent evidence and disregarded incompetent testimony. We recognize the rule, but the trouble with the application of it here is that when the incompetent testimony is disregarded, there is no sufficient evidence remaining upon which to support the finding. The evidence failed to show that any vested right of others in and to the waters of the stream would be injuriously affected by the transfer, and the statute provides that in such case the change will be allowed.

The judgment is *reversed*, and the cause remanded, with directions to the lower court to permit the transfer.

Reversed and remanded, with directions.

No. 8626.

DENVER & RIO GRANDE RAILROAD COMPANY v. THOMPSON.

1. PLEADING AND EVIDENCE—*Recovery Allowed*, only upon the allegations of the complaint.
2. NEGLIGENCE—*Not Presumed*, from the mere occurrence of an accident. Conjecture is not to take the place of evidence. The evidence examined and held insufficient to warrant the judgment in favor of the plaintiff in the Court below.

En Banc. Error to Chaffee District Court, Charles A. Wilkin, Judge.

Messrs. E. N. CLARK, R. G. LUCAS and T. M. STUART, Jr., for plaintiff in error.

Messrs. HILL, J., and TELLER, J., dissent.

Mr. G. K. HARTENSTEIN, for defendant in error.

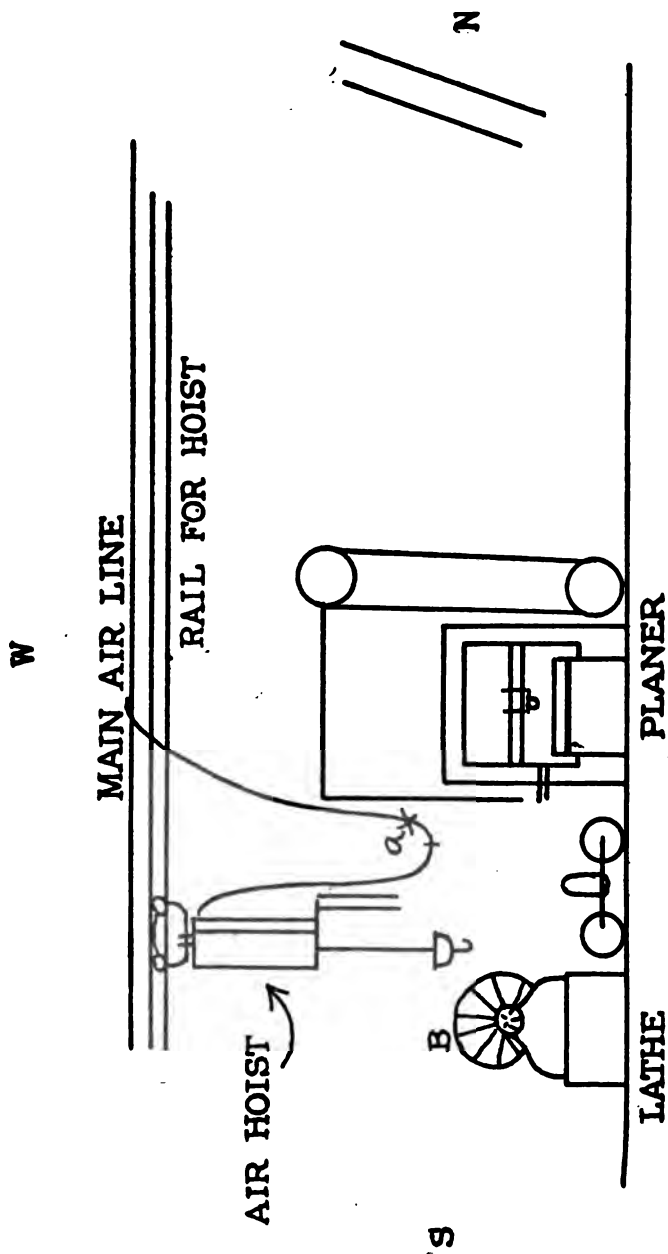
Mr. Justice Garrigues delivered the opinion of the court.

THIS action was instituted in the court below by Thompson, whom we will designate as plaintiff, against the Denver & Rio Grande Railroad Company, to obtain a judgment for damages occasioned by reason of an injury sustained by plaintiff, which he alleges was caused by the negligence of the railroad company. Judgment was entered upon a verdict returned in his favor, to review which defendant brings the case here on error.

The grounds of negligence alleged in the complaint are: That the employes of the company carelessly and negligently manipulated a hoist they were using, and carelessly and negligently failed to secure or fasten it so as to prevent it from moving, after the air hose was attached, and, the hoist being free to move and easily moved, defendant's employes negligently and carelessly permitted it to move or to pull or draw upon the hose with sufficient force to disconnect the coupling. Plaintiff's attorney in his brief states his position regarding the cause of the accident to be:

"That the air hose separated, or was uncoupled, because the hoist was pushed or pulled too far to the south, causing the hose to be stretched and pulled into a horizontal position, which caused the coupling to separate."

Plaintiff was employed by defendant as a machinist in its shops at Salida, Colorado, and operated a planer, near which was a movable hoist used to lift and move machinery. This hoist was mounted on rollers and suspended from a beam or rail, on which it was moved by being pushed or pulled along. A rubber air hose 8 feet 5 inches long hung down from the hoist, and there was a stationary air pipe along the ceiling from which was suspended another piece of rubber hose 13 feet 10 inches long. At the loose ends of these pieces of hose and used to attach them together was a standard Westinghouse air line coupling—such as is used in connecting cars for air brake service—1 foot 9 inches long, making the total length of the hose when coupled 24 feet. The relative position of the machinery is illustrated by the accompanying sketch:



The distance between the planer and the lathe was 9 feet and 10 inches. The hoist is operated by means of compressed air conveyed from the stationary iron pipe, through the coupled rubber hose into the piston chamber of the hoist. When it is desired to operate the hoist, these two pieces of hose are connected by the Westinghouse air coupling. On the day of the accident, while plaintiff was seated on and operating the planer, witness Elliott, a coemploye, used the hoist to pick up a pair of tank wheels and take them to the lathe. There was evidence that as the hoist with its load was pushed into position over the lathe and was about to be lowered, the hose coupling became disconnected and the piece attached to the hose leading from the stationary air line, swung towards plaintiff, the air pressure causing the end to fly around and strike him, knocking him from the planer to the floor, the fall resulting in the injury complained of. An examination of the coupling immediately after the accident disclosed no defect in any of its parts.

Garrigues, J. (after stating the facts as above) :

(1) Plaintiff must recover upon the allegations of his complaint. *Elkton Co. v. Sullivan*, 41 Colo. 241-250, 92 Pac. 679; *Soden v. Murphy*, 42 Colo. 352-356, 94 Pac. 353; *Chaffee v. Widman*, 48 Colo. 34-41, 108 Pac. 995, 139 Am. St. Rep. 220.

(2) No presumption of the negligence charged arose from the mere happening of the accident. *Greeley v. Foster*, 32 Colo. 292-300, 75 Pac. 351; *City of Denver v. Spencer*, 34 Colo. 270-276, 82 Pac. 590, 2 L. R. A. (N. S.) 147, 114 Am. St. Rep. 158, 7 Ann. Cas. 1042; *D. & R. G. Co. v. McComas*, 7 Colo. App. 121-123, 42 Pac. 676; *Bishop v. Brown*, 14 Colo. App. 535-548, 61 Pac. 50.

(3) A resort to mere conjecture or possibilities will not take the place of direct or circumstantial evidence. No number of mere possibilities will establish a probability. *Elkton Co. v. Sullivan*, 41 Colo. 242, 92 Pac. 679; *Patton v. Railway Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Samulski v. Menasha Co.*, 147 Wis. 285, 133 N. W. 142.

(4) It appears from the evidence that this particular hoist had been in daily operation in the shop where plaintiff was working for at least 6 years. There is no evidence as to the cause of the uncoupling of the hose. None of the witnesses were able to assign any cause. Plaintiff's theory is that the hoist was pushed or pulled so far as to cause the hose to be stretched or pulled in a horizontal position, causing it to become uncoupled. But there is no evidence to support this theory. Moreover, it was physically impossible to stretch a 24-foot hose to a horizontal position under the conditions and circumstances shown by the testimony, and there being no evidence establishing, or from which the cause of the parting of the coupling may be legally inferred, the jury could not guess that it was due to any negligent act or omission on the part of the defendant; consequently the judgment cannot stand.

Reversed and remanded.

Teller, J., dissents.

Hill, J. (dissenting). I have no criticism to offer concerning the authorities relied upon to sustain a reversal in this case, but I cannot agree with the deductions purported to be gathered from the testimony. As I read it, it fails to disclose that the hose had to be in perfect horizontal position in order to become disconnected, or that all of it had to be anywhere near a horizontal position in order for the coupling to become disconnected, but to the contrary that it would sometimes become disconnected when that portion which held the ends of the coupling reached a somewhat horizontal position.

The record discloses that when the witness Lewis was on the stand this coupling was before the jury and was, in their presence, coupled three times by the witness and E. G. Has-kins, and by them pulled straight or taut when it came apart each time. The witness Ecklund, a machinist of experience who had worked in these shops 6 years, testified that there were three of these connections with hose all constructed on the same line connection that was used as the one where Thompson's planer was; that there is a short one hanging

on the cylinder, then wherever you are at you connect; that one of these had become disconnected two or three times in the year preceding; that for this reason he tied the hose together when he used it; that he did this to be on the safe side; that he would not take any chances of the hose flying around him when it did break apart. In commenting as to how far you can move the hoist while the hose is connected, how many feet each way, he said:

"Oh, about 10 feet; if you move it further than 10 feet it is liable to become disconnected; don't know why it comes apart."

Also:

"I said just now that if the hoist were moved too far it would become disconnected. And when I said that I thought it could move about 10 feet, I guessed at that; in other words, the fact is that if the hoist is moved so as to stretch the hose out too far, then when it goes too far for the length of the hose it will separate, and that is what I meant."

The witness Wilson, a machinist who had worked in these shops a number of years and was there at the time the plaintiff was hurt, said:

"As to the effect, if any, it would have upon the hose if the hoist is moved in either one direction or the other, taut, it would not have any material effect, unless it was pulled too far, then it would have a tendency to let go; that is, coming apart. If the hoist is moved in either direction, one way or the other, too far, it would have a tendency to disconnect it; that is, far enough to straighten the hose. If it came far enough it would straighten the hose, and I think it would disconnect it; I think so."

Mr. Holman, a machinist for 30 years, who worked in these shops, testified:

"As to whether that hose would be uncoupled as I found it that morning if it was properly handled and properly manipulated I don't know. Something unusual had to happen, or else it had to be handled in a careless and reckless way to come apart, in my judgment."

Also:

"This hose, in my judgment, that is here in question, and

that came apart that morning, would not have come apart if it had been properly handled and manipulated. That is my idea of it."

The plaintiff testified that when they shoved the hoist the air pipe pulled apart; also, "It is liable to pull apart if you push it too far." In my opinion this testimony and the demonstration before the jury (where the coupling appears to have come apart in the manner the plaintiff contended it would and did at the time of the accident) presents evidence sufficient to go to the jury upon the question of the alleged negligence in the handling of the hoist. The plaintiff was not required to prove this fact by direct testimony. Negligence may be proved by showing circumstances from which it may fairly and logically be inferred. *Hotchkiss Mt. M. & R. Co. v. Bruner*, 42 Colo. 305, 94 Pac. 331.

The rulings of this court have been uniform that where the evidence is such that different minds may honestly draw different conclusions, it is a question for the jury. *Catlett v. C. & S. R. Co.*, 56 Colo. 463, 139 Pac. 14; *Nichols v. C. B. & Q. R. R. Co.*, 44 Colo. 501, 98 Pac. 808; *Williams v. Sleepy Hollow M. Co.*, 37 Colo. 62, 86 Pac. 337, 7 L. R. A. (N. S.) 1170, 11 Ann. Cas. 111.

As I view it under the authorities last cited, the question of the negligence of the defendant in the manner complained of was properly submitted to the jury.

April Term, 1918.

No. 9033.

CARLSON ET AL. v. RENSINK ET AL.

1. VENUE—*Action for Tort.* Action for fraud in procuring an exchange of lands. The lands parted with by defendants, and as to which false representations were alleged, were situated in Arapahoe County. All parties were residing in Denver at the time of the transaction, and at the institution of the plaintiffs' suit. Motion to change the venue to Arapahoe, denied.

Judgment affirmed.

2. FRAUD—*Relief Against.* A promissory note and a deed of trust upon land, securing it, were obtained by fraud. In an action against one who obtained the note after maturity, a judgment cancelling both the note and the deed of trust was affirmed. There being, under the circumstances of the case, no other relief possible, that the action was in tort, for damages, was held no bar to this equitable form of relief.

Error to Denver District Court, Hon. Haslett P. Burke, Judge.

Mr. HENRY HOWARD, JR., for plaintiffs in error.

Mr. JOHN D. MILLIKEN, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was brought to recover damages for the alleged fraud and deceit of Oscar H. Carlson, one of the defendants, in a transaction involving an exchange of ranch property owned by him, for Denver city property, owned by William and Johanna Rensink, plaintiffs, and for the cancellation of a note and trust deed for \$500.00 in favor of defendant Hulda M. Carlson, Oscar's wife, given in the exchange of properties. That note was, after maturity, transferred to the other defendant, Anderson. The jury returned special findings to the effect that defendant Carlson showed plaintiffs other and different land than the tract owned by him, which was to be exchanged, with an intent to deceive and mislead them; that the land shown by Carl-

son was worth \$20.00 more per acre than the land which he actually owned and proposed to trade; that the other defendants knowingly and deliberately participated in the deception, and that the note in question was taken by Anderson to aid in the consummation of the fraud. That the moving cause of the deal was the false and fraudulent representations of Oscar.

Upon such findings the court entered judgment against Carlson in damages for the sum of \$1,410.00. The note and trust deed were ordered cancelled and the amount of the note deducted from the judgment, reducing same to \$910.00, in default of payment of which Carlson was ordered confined in the county jail for a period not to exceed four months. Defendant Anderson had foreclosed the deed of trust, and the certificate of purchase under the foreclosure was decreed to be the property of plaintiffs. Defendants bring the cause here for review.

Error is assigned on the refusal of the court to grant a change of venue to Arapahoe County for the reason that the land owned by Carlson, and exchanged through the alleged fraud, was situated in that county. The theory of defendants is that if a tort was committed it was committed in that county. The residence property exchanged by plaintiffs for the land is in the City and County of Denver. Both plaintiffs and all the defendants, at the time of the transaction resided in the latter county, and did so reside when this action was brought, and service of process was had therein.

In *D. & R. G. R. R. v. Cahill*, 8 Colo. App. 162-7, 45 Pac. 286, the following rule is announced:

"In an action for tort, which is this case, the county where the defendant resides, and the county where the plaintiff resides and the defendant is served, and the county where the tort is committed, are equally proper counties for trial; and if the action is commenced in any one of these counties, the place of trial cannot be changed on the ground that the county designated is not the proper county."

Under this decision it was not error to deny the application for a change of venue.

It is urged that there was no evidence to warrant the cancellation of the note and trust deed in the hands of defendant Anderson. It appears that he got the note more than two years after it became due, and that he traded "some other old and overdue paper" for it. The jury found that he secured the note as a part of the plan to defraud plaintiffs. In any event he took the note when it was long overdue and cannot, therefore, claim immunity as an innocent purchaser for value. Manifestly the judgment of the District Court should not be disturbed upon this contention.

The cancellation of the note is also objected to for the reason that the cause of action is in damages, and such cancellation amounts to at least a partial rescission of the contract, and was therefore erroneously decreed.

It was alleged, and the testimony supports the claim, that Carlson was insolvent and had concealed his property in fraud of creditors; that the real estate conveyed to his wife, Hulda, by plaintiffs had been transferred and that it was beyond Carlson's power to restore it. And further, that rescission had been made impossible by the acts of the defendants themselves. In such circumstances plaintiffs could not elect as to remedy. They had but one, which was for damages. The cancellation of the note involves rather a question of relief than of remedy. There is but one remedy, the relief is twofold. Directing the cancellation of the note was merely a practical way, in view of the circumstances of the case, of applying relief under the only remedy that plaintiffs had. Damages had been fixed at \$1,410.00, from which was deducted the face value of the outstanding \$500.00 note. It would be absurd to hold that this could not be properly done. This is not a judgment for both rescission and damages, nor an improper joinder of causes. It is simply an instance, such as is discussed in *Mullen v. McKim*, 22 Colo. 474, 45 Pac. 416, where this court, after quoting with approval from Sec. 171 of Bliss on Code Pleadings, proceeds as follows:

"In such cases, as is well stated by Professor Bliss, in seeking what is still called legal and equitable relief, the

plaintiff does not really unite two different causes of action, for there is but one. He only seeks the two-fold relief for the one wrong."

In *Marple v. Minneapolis & St. L. Ry. Co.*, 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082, plaintiff brought action for damages after having accepted a sum of money from the railway company under contract of settlement. The amount so received was not tendered back to the company, but was deducted from the damages awarded. In discussing this phase of the case the court said:

"There are many cases in other states which hold that substantial justice is secured and the spirit of the rule followed where no return or offer to return is made in the pleadings, but where the money received on the settlement is deducted from the amount of the recovery, in case there is a recovery for a greater sum. Some cases hold this on the ground that, where plaintiff was entitled to the money irrespective of the contract, it is inequitable that he should be required to pay it back as a condition of rescission; others, on the ground that equity will not compel the doing of a useless act, and will not permit a mere technicality to defeat justice. But the real ground of all the cases, we think, is that there is no reason for the strict application of the rule when substantial justice can be meted out in the final disposition of the case."

It appears that the judgment rendered is just and that the cancellation of the note in effect amounts to no more or less than a partial liquidation of the damages awarded plaintiffs.

The instructions given fairly and correctly state the law of the case, and the assignments of error based upon a refusal to give instructions tendered by defendants are not well taken. The other assignments not specifically referred to are also without merit.

The judgment of the district court is affirmed.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9158.

DENNISON, ALIAS HOGAN v. THE PEOPLE.

1. **CRIMINAL LAW—Error—Examination of the Evidence.** Where there is evidence to support a conviction the court of review will not consider its weight.
2. — *Cross-Examination of Accused as to a Former Conviction.* The accused testifying in his own behalf, may, on cross-examination be asked in the language of the statutes, if he has been convicted of a "crime."
Accused failing to give a direct answer may be further cross-examined, in the discretion of the court.
The jury should be charged that the fact of his conviction goes only to his credibility.

*Error to Pueblo District Court, Hon. C. S. Essex, Judge.
Department.*

Mr. D. M. CAMPBELL, Mr. S. D. BROSIUS, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. IRVING VAN BRADT, Mr. CHARLES ROACH, Miss CLARA RUTH MOZOR, Assistant Attorneys-General, for The People.

Opinion by Mr. Justice Teller.

The plaintiff in error was convicted of burglary, and brings error.

It is urged, first, that the evidence does not sustain the verdict of guilty, and in support of that contention counsel point out that the principal witness, who identified the defendant as the person he had seen running into the building where the stolen articles were found, had, according to one of defendant's witnesses, admitted on the preliminary hearing that he could not identify him. This evidence, if accepted by the jury as true, of course, went to the jury as bearing upon the credibility of the State's witness, and we cannot say that the jury was wrong in its determination on that question. There being evidence to support the verdict, we cannot consider the question of its weight.

It is further contended that the court erred in permitting the district attorney, on the cross-examination of de-

fendant, "to go farther in impeachment of the defendant than to inquire of him if he had not been convicted of a felony." The statute provides that "the conviction of any person for any crime may be shown for the purpose of affecting the credibility of such witness." Sec. 7266, R. S. 1908. Counsel object to the question upon the ground that the offense of which defendant had been convicted was a mere misdemeanor, and, therefore, not within the statute, but the record fails to show the grade of the offense.

Defendant was asked, in the very language of the statute, whether he had been convicted of a *crime*. The objection to it was properly overruled.

Nor was there error in permitting the State to cross-examine defendant as to his prior conviction, when he failed to give a direct answer to the question above mentioned. His equivocation made it proper to ask additional questions to bring out the fact of his conviction. *Johns v. State*, 88 Neb. 146, 129 N. W. 247.

"The inquiry is not confined to the mere fact of conviction of some crime, but the nature or name of the particular crime of which the witness was convicted may be brought out." 40 Cyc. 2610.

In *Le Master v. People*, 54 Colo. 416, 131 Pac. 269, this court said that the extent to which cross-examination in such cases may go is largely within the discretion of the court, and mentioned without criticism, the fact that the history of the witness, his sojourn in jail, etc., had been gone into fully as a basis for the jury's judgment on his credibility.

Of course, the jury should be instructed that such evidence is admitted only for the purpose above stated, and in the absence of objection on that point it must be assumed the court did its duty in that respect.

None of the other assigned errors is argued, and they therefore call for no consideration.

Finding no error in the record, the judgment is affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice White concur.

No. 9051.

HOOVER v. CATROW.

1. **JUDGMENT—Conclusive Effect.** A judgment is final and conclusive as to a question properly involved in the action, and which might have been raised and determined therein. Plaintiff and defendant were shareholders in a corporation which was declared a bankrupt, and the property of which was sold in the bankruptcy proceedings. In January 1909 they entered into an agreement with others, creditors of the bankrupt, providing that the stock of a mining corporation which had acquired the properties of the bankrupt, at the sale thereof above mentioned, should be divided among the parties to the agreement, in proportion to their claims against the bankrupt corporation, but upon condition that each of the parties agreeing should pay into a bank named a specified proportion of the cash capital of the new corporation. Plaintiff never made the payment required by this agreement.

Defendant acquired title to certain mining properties formerly held by the bankrupt corporation, under a sale thereof pursuant to the powers contained in a trust deed executed by the new corporation. The latter corporation was afterwards, in its turn, declared a bankrupt and the trustee in bankruptcy, presented in the court in bankruptcy a petition for an adjudication of the status of the property. To this petition the plaintiff filed an answer claiming to be a stockholder in the last bankrupt corporation, under the agreement of January 1909, and alleging that the deed of trust under which defendant was claiming, was void. The court in bankruptcy declared the deed of trust valid, the sale thereunder regular, that the agreement of January 1909 was never executed, and that plaintiff never became a stockholder thereunder, in the last corporation. Plaintiff thereupon brought this action, asserting that the agreement of January 1909 constituted the parties thereto partners, and that defendant's purchase at the sale under the deed of trust was for the common benefit of all the parties to that agreement. *Held* that this contention might have been submitted to the court in bankruptcy, and therefore, the judgment of that court concluded the matter.

Error to Denver District Court, Hon. John A. Perry, Judge. Department.

Mr. HALSTED L. RITTER, for plaintiff in error.

Mr. EARL H. TURNER, Mr. J. E. ROBINSON, for defendant in error.

Opinion by Mr. Justice Teller.

Plaintiff in error brought suit against the defendant in error to establish a right to an interest in mining property, to which the latter had title, and was defeated in the action. A brief statement of facts is necessary to an understanding of the question for determination.

The property involved was at one time owned by the Griffith Mines Company, which was adjudged a bankrupt by the U. S. District Court in Denver, both plaintiff and defendant being creditors of said bankrupt. The defendant, a resident of Ohio, in December, 1908, formed in that state the "Mound Mines Company," to which he assigned his claim against said bankrupt, as did some other creditors. The Mound Mines Company, on February 3, 1909, bid in said mining property at the sale in the bankruptcy proceedings, and afterwards conveyed it to the Public Trustee of Clear Creek County, to secure the payment of \$5,000 borrowed on the promissory note of said company. The property was subsequently sold under the trust deed, and bought in for the defendant, who later received title by trustee's deed.

Plaintiff claims an interest in the property under a contract dated January 27, 1909, between the plaintiff, the defendant and one Umbenhauer, in which it was provided that the stock of the Mound Mines Company should be issued to said persons, in proportion to the amount of their claims against the Griffith Mines Company, provided that each of said persons should pay into a designated bank his proportion of the amount of cash capital certified to said bank by the officers of the Mound Mines Company to be required to be paid to said company.

On April 10, 1912, a certificate was delivered to the bank to the effect that plaintiff was to pay for 5705 shares of the capital stock the sum of \$17,685.50, and stock certificates therefor were left with the bank, for delivery, when payment had been made. Plaintiff refused to pay said sum and never paid it, and never received any of the stock certificates.

In January, 1913, the Mound Mines Company was adjudged a bankrupt, and plaintiff filed his claim against the bankrupt estate. Later the trustee in bankruptcy presented to the referee a petition for an adjudication of the status of the property in controversy, to which petition the plaintiff filed an answer, claiming to be a stockholder of the Mound Mines Company, and alleging that the deed of trust heretofore mentioned was void, because not authorized by the stockholders as required by the law of this state. His claim to be a stockholder was based upon the contract of January 27, 1909. The referee found that the deed of trust was valid, and the sale thereunder regular, and that the bankrupt had no interest in said property. Also, that the agreement of January 27, 1909, was a contract for the purchase of stock in the Mound Mines Company, which was never executed, wherefore plaintiff never became a stockholder in said company either in law or in equity.

On a petition for a review, filed by plaintiff, the Bankruptcy Court sustained the rulings of the referee.

Thereupon the plaintiff brought the action now under consideration, claiming that the contract of January 27, 1909, made the parties thereto co-partners; and that, when the defendant obtained title under the foreclosure sale, he did so as trustee for said parties.

The trial court held that the judgment of the Bankruptcy Court was final, and dismissed the cause for want of jurisdiction.

Plaintiff in error now urges that the Bankruptcy Court considered only petitioner's claim to be a stockholder, and that the judgment there rendered does not prevent a claim to the property under the contract of January 27th, treated as a partnership's agreement.

The gist of plaintiff's claim set up by answer to the trustee's petition, and adjudicated in that proceeding, was that plaintiff by said contract obtained an interest in the property of the Mines Company. He there contended that this interest came to him as a stockholder of the company, and submitted the contract, and asked that it be construed according to that theory. He now asks that it be construed

differently, so as to give him the interest which he claimed under the first theory.

Manifestly he could have asked the Bankruptcy Court to give to the contract the construction for which he now contends; in other words, that is a question which was properly involved, and might have been raised and determined in that proceeding. That adjudication is, therefore, final and conclusive. *Bushnell v. Larimer & Weld Irr. Co.*, 56 Colo. 92, 136 Pac. 1017.

The trial court did not err in dismissing the action, and the judgment is therefore affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice White concur.

No. 9403.

STACKS v. THE INDUSTRIAL COMMISSION ET AL.

1. INDUSTRIAL COMMISSION—*Action to Vacate Award or Finding.* Under sec. 77 of the Workman's Compensation Act (Laws 1915 c. 179) no action lies to vacate or amend a finding or award of the commission unless the party complaining has first applied to it for a rehearing.

Refusal of the commission to hear oral argument, after an order made, is not sufficient to support an action to vacate such order.

2. ESTOPPEL—*To Deny Jurisdiction.* The defendant to an action cannot be estopped to deny the existence of a fact, which under the statute, is a prerequisite to jurisdiction.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Mr. GEORGE F. DUNKLE, Mr. EDWARD V. DUNKLE, for plaintiff in error.

Mr. LESLIE E. HUBBARD, Attorney General, Mr. JOHN L. SCHWEIGERT, Assistant Attorney General, Mr. D. L. WEBB, for defendants in error.

Opinion by Mr. Justice Allen.

IN July, 1916, the plaintiff in error, as claimant filed with the Industrial Commission a claim for compensation.

After hearing had been had, and on January 11, 1917, the commission made its findings and award in favor of the claimant. On February 7, 1917, The Dillon-Box Iron Works Company and The Globe Indemnity Company, being the employer, and the insurance company, respectively concerned in or affected by the proceedings, filed a petition for a rehearing which was thereafter granted by the commission.

On March 12, 1917, the Industrial Commission conducted a second hearing, pursuant to the provisions of the Workmen's Compensation Act, upon the claim of the plaintiff in error for compensation. As a result of this hearing the commission, on May 10, 1917, made its finding and order whereby it denied compensation to the claimant.

On June 26, 1917, the plaintiff in error, claimant before the commission, filed her complaint in the District Court of the City and County of Denver, seeking to set aside the commission's finding and order of May 10, 1917, and to recover compensation under the Workmen's Compensation Act, claimed to be due her as dependent of a deceased workman or employee, whose death is alleged to have been proximately caused by injuries received in the course of his employment.

To the complaint the Industrial Commission as defendant filed an answer wherein it included a demurrer, set up the fact, and alleged, "That no petition for re-hearing on behalf of the plaintiff herein, and the claimant before the Commission, was filed within the time allowed by the statute."

The defendant employer and the defendant insurer filed their joint demurrer, wherein it is alleged that the amended complaint "shows upon its face that no petition for rehearing, verified or otherwise, on behalf of the plaintiff herein, being the claimant before the Commission, was filed within the time allowed and required by the statute."

The trial court sustained the demurrers. The case is now here on writ of error, and the principal question presented by the record is the propriety of the District Court's ruling upon the demurrers. If the demurrer was properly

sustained, all other questions discussed in the briefs become immaterial.

The record shows, and the fact is not disputed, that the plaintiff below had, at no time after the Commission made its finding and order of May 10, 1917, filed with the commission a petition for rehearing as provided by section 69 of the act.

The situation thus far presented in this opinion is controlled by the case of *Passini v. Industrial Commission et al.* (No. 9294) 171 Pac. 369, recently decided by this court, holding that the District Court is without jurisdiction to review the actions of the commission until the claimant shall have first petitioned it for a rehearing as provided by section 69 of the Workmen's Compensation Act, and that an appeal taken from the commission, by a claimant who had not filed such a petition for a rehearing is "incompetent and futile."

Counsel for plaintiff in error, the claimant below, argues, however, that the *Passini* case does not apply to the facts in the instant case, as contained in the allegations of the amended complaint. Counsel base their argument upon principles of estoppel, and claim that the Industrial Commission is estopped from taking advantage of the fact that claimant had not filed any petition for a rehearing.

The amended complaint alleges that on June 22, 1917, the plaintiff claimant made a written request of the commission to "be permitted to argue orally the matters and things brought out at the hearing" on March 12, 1917; that the Commission on the same day decided, and notified the plaintiff "that under the law this Commission has not the power to grant successive rehearings, nor to grant an oral argument at this time;" and that the claimant "relying upon said decision" commenced this action by filing her complaint in the District Court.

The facts thus alleged in the amended complaint in no way and to no extent take this case out of the rule followed in the *Passini* case. No facts are alleged which show that the commission treated the request for an oral argument as an application for a second rehearing, and we do

not concede that such showing would have been material if made. If it be assumed that the amended complaint shows that the plaintiff failed to file a petition for rehearing because "relying upon said decision of the Commission that successive rehearings could not be granted," this fact does not affect the result.

The principles of estoppel, mentioned in the brief of the plaintiff in error, have no application in the case at bar. No rule in equity can be invoked to invest the District Court with jurisdiction in this case or to avoid the necessity for a strict compliance with section 77 of the act which provides that:

"No action, proceeding or suit to set aside, vacate or amend any finding, order or award of the Commission, * * * shall be brought unless the plaintiff shall have first applied to the Commission for a hearing as provided in this act."

Jurisdiction of the subject matter cannot be based on an estoppel of a party to deny that it exists. 15 C. J. 809. A party is not estopped from denying the existence of a fact which the law requires to appear in the case as a prerequisite to entitle the claimant to appeal and in order to give the District Court jurisdiction over the subject matter. Section 77 of the act, above quoted, is explicit, and it is clear that the District Court could acquire no jurisdiction over the subject matter unless the fact appeared in the record that the petitioner had made application to the commission for a rehearing, in formal procedure and within the time provided by the act. When the record of the case shows that no petition for a rehearing had been filed, which is equivalent to showing the absence of a fact, that confers jurisdiction upon the district court in such a case, there is no rule in equity which would estop the defendants from asserting that such jurisdictional fact did not exist or prevent them from urging or showing the want of jurisdiction.

The right of appeal is statutory, and a party desiring to avail himself of such privilege must comply with the statute in that regard. In the instant case the plaintiff failed to avail herself of her right to petition the commission for

a rehearing before she appealed to the District Court, and, as said in the *Passini* case, "for this reason the appeal was incompetent and futile."

The demurrers were properly sustained, and the judgment therefore affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 8980.

SNYDER v. HAMILTON NATIONAL BANK.

1. APPEAL AND ERROR.—Findings Supported by Evidence, will not be disturbed.
2. BANK—*Accepting Check Drawn Upon Itself*.—A bank is presumed to know whether a check drawn upon itself is good, and if it pays it, or credits it to a depositor's account, it will not be allowed to afterwards change its position and repudiate the check, without an agreement express or implied, to the contrary. The evidence examined and the bank held justified in charging back to a depositor a check drawn upon itself, and for which the depositor had received credit.

Error to Denver District Court, Hon. George W. Allen, Judge.

Mr. CHARLES K. PHILLIPS, Mr. WILLIAM A. REEF, for plaintiff in error.

Messrs. BARDWELL, HECOX, MCCOMB & MEANS, for defendant in error.

Chief Justice Hill delivered the opinion of the court.

The plaintiff in error seeks to recover from the defendant in error bank \$1,750.00, which he alleges was the amount he had on deposit in the bank, subject to check, on November 26, 1915. Trial was to the court, which found the issues in favor of the defendant bank, and gave it judgment for costs.

The record discloses, that on September 17, 1915, the plaintiff opened an account with defendant by depositing \$100.00; that prior to September 29th, following, he had given checks upon this deposit in the sum of \$99.30, leaving

a balance due him of seventy cents; that previous to said September 29th, Timothy Ross and Alfred Dunham were engaged in a real estate transaction, or negotiations pertaining to a partial exchange and sale of properties, whereby the plaintiff was to receive a commission; that under the assumption that the deal had been consummated, Dunham gave to Ross, in Denver, two checks on a Tulleride bank, payable to Ross, for \$4,000.00 and \$6,000.00, respectively, dated September the 29th, 1915; that on the same day Ross gave to plaintiff checks on defendant bank for \$1,000.00 and \$1,500.00 respectively, in part payment for plaintiff's services in the real estate deal; that at the time of giving these checks Ross had but a small amount on deposit in defendant bank, but upon the same day, and at or about the same time, he deposited in the defendant bank to his credit the \$4,000.00 Dunham check; that upon the same day and at or about the same time, the plaintiff deposited to his credit in the defendant bank the two Ross checks hereinbefore referred to; that on the same day, the plaintiff drew a check on his account in defendant bank to the Colorado State Savings bank for \$800.00; that before accepting it, the cashier of this bank phoned the defendant bank asking if it was good, and received an answer from some one that it was; that this \$800.00 check was paid by defendant bank upon the same day. Thus far there is no conflict in the testimony. From this point on that of the plaintiff and the agents of the defendant differ materially. Mr. Weckbach, the defendant's assistant cashier, testified, in substance, that early on the morning of September 30th, 1915, Mr. Dunham, or his attorney, called at the defendant bank and notified the witness that Dunham had stopped payment on the \$4,000.00 check to Ross; that the witness immediately notified Mr. Burger, the defendant's cashier, of this fact. Mr. Burger testified, in substance, that after receiving this information he, upon the morning of September 30th, notified the plaintiff that the checks which Ross had given him were not good because they had been notified by the maker that payment had been stopped on the Dunham check, and that they would want

him to make good the amount already honored on his check, viz., \$800.00; that the Dunham check was recharged to the Ross account, and the Ross checks recharged to the plaintiff's account; that the Dunham check was in due time returned endorsed "payment stopped," but that he acted in the matter immediately upon being notified that Dunham had stopped payment on it, and before its return; that in response to his demand upon plaintiff that he make the \$800.00 overdraft good plaintiff said he would do so, he would make it good, etc.; that he had redeemed a debt he had at the Colorado State and Savings Bank, had redeemed some diamonds, and he would make the account good by getting the diamonds and putting them in defendant bank; that he came back and brought the collateral; that he gave his note to the defendant bank for \$795.30 to square up the account, thus closing it; that he put up with the note, as collateral, certain diamonds; that thereafter he borrowed from defendant bank \$100.00 or \$150.00 more, which he repaid, and paid some little interest on the other; that thereafter when it became due, he renewed the note or gave two new notes rather in lieu thereof, and that the defendant held these notes at the time plaintiff brought this suit; that all of these notes were payable to the defendant bank. The witness also testified that he secured a note from Mr. Ross payable to the bank for \$1,500.00 as collateral upon the note of Mr. Snyder given for the purpose of paying up Snyder's deficiency; that this Ross note was obtained at Snyder's request; that, on the morning of September 30th when he notified Snyder of his deficiency and the reason for it, Snyder asked the witness to get Ross to pay it, and that he, Burger, told him he would try to get the money from Ross; that in pursuance of his efforts under such promise Ross told the witness that he would get the money in ten days, and that he gave to the witness the \$1,500.00 note payable to the bank; that he took this note for the protection of the plaintiff and at his request.

The plaintiff testified that when he deposited the Ross checks he said: "Mr. Burger, I have some debts that are past due, can I check on this to do it?" that he, Burger,

said: "Sure, this is as good as wheat." He admits that he was notified by Burger of the stoppage of payment on the Dunham check, etc.; he also admits the giving of the original note, and the putting up of the collateral as security for it, which note would represent the amount of his overdraft in defendant bank, were the two Ross checks properly recharged to him. He also admits the giving thereafter of the renewal or new notes representing the purported obligation. His explanation for giving the first note is that on the morning of September 30th, Mr. Burger told him that Dunham had stopped payment upon a check that had got him into difficulty, etc.; that the transaction had got him into trouble with his directors and he said "I wish you would help me out, in some way. I will get the money out of Ross. I am going to get the money out of Ross and Dunham. Dunham is the man. I want you to help me out some way, as a personal accommodation, so I can get the money out of Ross * * *" that Burger wanted to know if he would not go and get some collateral, and put up there with him, personally, so he could not get in trouble with his directors; that he then said, "In the meantime, I had talked it over with my friend, I went back the next morning and he still insisted I could get some collateral, and I went and got collateral, and went on my note and when I got him that collateral I said 'Mr. Burger, hold this collateral in your hands, and don't mix it with the bank's interest. I am doing this as a personal accommodation to you, and you get the money out of Ross'"; that Burger called him the next day and said "I think I have saved myself and you, too, I have taken Ross' note for the amount for ten days. We have known Ross, he always pays his bills. He is sometimes slow but never refuses to pay his bills. I have his note, as soon as that it paid you can have your money." The witness admits that he renewed his note to the bank on November 24th, by giving two notes, and paid some interest on them, but said "I do not know of making the notes to the Hamilton National Bank, I was endeavoring to aid Mr. Burger in view of his own suggestion to keep him out of difficulty with his directors, and to

give him time; Mr. Burger was a stranger to me. * * * Mr. Ross was absolutely a stranger to me." Referring to Exhibits 1 and 2 which were the renewal notes executed by the plaintiff to the bank, and not to Burger, on November 24, 1915, the witness says "I had made, executed and delivered Exhibits 1 and 2 formally." He denies that the Dunham checks were ever mentioned between them until he was informed the next day of the difficulties which had arisen concerning the \$4,000.00 one, but on cross-examination said "In fact, I supposed until recently that the full \$10,000.00 had been deposited there (meaning the two Dunham checks) I learned only \$4,000.00." This statement concerning his supposition of the disposition of the Dunham check is hardly consistent with his statement that he knew nothing about their disposition, or with his counsel's contention that he was relying solely upon his, Ross's checks, regardless of where Mr. Ross was to get the money to pay him, or on the assumption that he then had it, or that the bank would otherwise extend credit to him or Ross for it, and especially so when according to his testimony he was negotiator or agent between Ross and Dunham, knew all about the transaction, and was to get \$7,500.00 from Ross' side of it, if it went through.

The witness Burger denied the truth of plaintiff's testimony pertaining to his statements to him, or any communication other than as heretofore and hereafter set forth in Burger's testimony, or that there were any personal transactions between them or any reference to any such. He says that plaintiff's first note was made payable to the bank, which the plaintiff does not deny, as well as the second two (which so show). He also says that Ross was practically a stranger to him; that he opened his first account with the bank at the same time the plaintiff did, and that he was introduced to the witness by the plaintiff. Pertaining to his giving the plaintiff permission to cneck, as he did, on the strength of the Ross checks, Mr. Burger admits that at the time plaintiff deposited the Ross checks that he might have thus asked him.

The plaintiff contends that the record discloses that the

bank in no manner predicated the crediting of the \$2,500.00 Ross checks to plaintiff, upon anything but its own reliance on the account Ross maintained with it, and that it positively assured the plaintiff, through its cashier, that the Ross checks drawn on it were good. The difficulty with this position is that it ignores the testimony on behalf of the defendant. As heretofore stated, the testimony was conflicting on this question. It cannot be harmonized. It was the province of the trial court to determine who was telling the truth, and it is not the privilege of this court to disturb that finding. In commenting on this phase of it, the court said:

"From the evidence in this case the court is of the opinion that the plaintiff obtained the credit of twenty-five hundred dollars upon the 29th day of September, by reason of the deposit of the four thousand dollar check called the Dunham check, which was afterwards repudiated; and when the bank discovered that the check by Dunham, upon which it had a right to rely, and as the court finds from the evidence did rely, was repudiated in payment by the drawer of the check, that good conscience and the law ought to protect the bank against the payment of the twenty-five hundred dollars of the fund which must result, if paid, in an absolute loss to the bank."

There being evidence to support this finding, we are not at liberty to disturb it.

If we understand it correctly, the next contention of plaintiff is that when the bank received the Ross checks for deposit by plaintiff, and credited them to his account and charged them to Ross' account, that because these checks were drawn upon Ross' account at defendant bank, that it constituted a payment of them to the plaintiff by the bank, and not an extension of credit to the plaintiff; that if the Ross account proved insufficient to satisfy them, or uncertain upon account of checks deposited by him, which might be returned, that in accepting the Ross checks the credit was extended to Ross, and not to the plaintiff, and for that reason that regardless of what might thereafter happen concerning the Ross account, the bank was

not at liberty to recharge the Ross checks to the plaintiff and hence was owing him the amount sued for. This, upon the theory that when a bank accepts a check drawn on itself, either by payment or by depositing to the credit in the bank of the person presenting it, that it is presumed to know whether the check at that time is good or not, and if it accepts it, it cannot thereafter repudiate its act in this respect. The following cases are cited as sustaining this contention: *City National Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *National Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *Oddie et al. v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *S. E. Trust Co. v. Huff*, 63 Wash. 225, 115 Pac. 80, 33 L. R. A. (N. S.) 1023, Ann. Cas. 1912D, 491; *National Bank v. Berrall*, 70 N. J. Law, 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821, 1 Ann. Cas. 630; *Levy v. Bank*, 4 Dall. 234, 1 L. Ed. 814; Michie on Banks and Banking, vol. 2, § 124.

Without an agreement expressed or implied or understanding directly or indirectly to the contrary, we may concede that the general rule as contended for and supported by these authorities is correct, but as said in the first of them, viz., *City National Bank v. Burns*, 68 Ala., at page 275, 44 Am. Rep. 138, "Contracts, agreements, transactions between parties should have operation and effect according to their intention." And again at page 276, "It is the intention of the parties which must govern."

In *Lumsdon v. Gilman et al.*, 81 Hun. 526, 30 N. Y. Sup. 1124, it appears that the depositor and defendant agents both knew, when the draft which was drawn on the defendant bank was offered for deposit, that the drawer was insolvent. He then had an apparent credit with the bank exceeding the amount of the draft, but afterwards an error was discovered which entirely absorbed the apparent credit. The bank's clerk testified that he accepted the draft under an agreement with plaintiff that if there was any trouble about it, it should be charged back to plaintiff's account. It was held proper to ascertain the intention of the parties and that a verdict for the defendant bank on that issue would not be disturbed. In *Arkansas Trust & Banking Co.*

v. Bishop, 119 Ark. 373, 375, 178 S. W. 422, at page 423, the court said:

"The only question in this case for the decision of the jury was whether the bank accepted the check and became liable to the payment of the amount for which it issued its deposit slip to the drawee thereof. The intention of the parties to the transaction could properly have been shown for the determination of this question."

In *Pollack v. Bank of Commerce*, 168 Mo. App. 368, 151 S. W. 774, it is held that a depositor may make a valid agreement with the bank that payment shall be deferred for a reasonable time until the bank can ascertain whether or not there are sufficient funds of the drawer in its hands to pay it, and that such an agreement may be established from a custom to that effect, etc. These cases, while not exactly like the one under consideration, involve somewhat similar propositions.

The court found and there is evidence from which it can properly be inferred that the plaintiff obtained the credit of the \$2,500.00 evidenced by the Ross checks to him by reason of the deposit of the \$4,000.00 Dunham check by Ross. This, of course, had to be under the assumption that the Dunham check would be paid, and in case it was not that the bank necessarily had the right to recharge the Ross checks to the plaintiff the same as it would have, had the Dunham check been deposited by him. When the shortage created by the Dunham check was disclosed it immediately did so; he was advised to that effect the next morning after he had deposited the Ross checks, and was requested to make good the amount of his overdraft given on the strength of this credit. In response to this demand, he voluntarily, when in possession of all the facts, acquiesced in this arrangement and gave his note and security for the overdraft which terminated in the closing of his account. His actions at that time were in harmony with the court's finding as is his testimony in part to the effect that Mr. Burger told him he could draw checks on the strength of his deposit of the Ross checks to pay other indebtedness, otherwise, if the checks were accepted as that much cash

when deposited, why the necessity of getting permission at all to check on this account.

In *Lovell v. Goss*, 45 Colo. 304, 101 Pac. 72, 22 L. R. A. (N. S.) 1110, 132 Am. St. 184, this court quotes with approval from *Manhattan Life Insurance Co. v. Wright*, 126 Fed. 82, 61 C. C. A. 138:

"The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious error."

This declaration is applicable here and is just what the trial court did. The plaintiff admits that after he was advised of both his and Ross' shortage, occasioned by the stopping of payment on the Dunham check, and after he had talked it over with a friend, that he went back to the bank the next day and gave his note (and secured it with diamonds) to represent the amount of this shortage, which did not exist, had he the right to rely upon his deposit of the Ross checks. In such circumstances, when the testimony is considered as a whole, we cannot agree that there is no competent testimony to sustain the finding of the trial court.

The judgment is affirmed.

Affirmed.

Mr. Justice Garrigues and Mr. Justice Scott concur.

No. 9385.

MIDLAND CASUALTY COMPANY v. ANDERSON.

LIFE INSURANCE—*Hazardous Occupations*. That the insured engages in an occupation more hazardous than that in which he is insured, does not entitle the insurer to an abatement of the award, in an action upon the policy, where it appears that the deceased accepted the more hazardous occupation temporarily, had already quitted it without any intention of returning to it, and his death occurred from causes having no relation to the more hazardous calling.

*Error to Ouray District Court, Hon. Thomas J. Black,
Judge.*

Mr. JOSEPH D. PENDER, for plaintiff in error.

Mr. MILLARD FAIRLAMB, for defendant in error.

Chief Justice Hill delivered the opinion of the court.

UPON the trial to the court, the defendant in error had judgment for \$2,000.00 and interest, being the amount named in an accident insurance policy issued by plaintiff in error to Elmer G. Anderson, deceased, in which his wife, Stella C. was designated as the beneficiary. At the time of the issuance of this policy, Anderson gave his occupation as "ore mine superintendent, supervising only, inside and outside duties."

The policy contains the following provisions:

"If the insured suffers such injury while engaged in any occupation classified by the company as more hazardous than that herein given, the amount payable shall be for such proportion of the indemnity herein provided as the premium paid would purchase at the rate and within the limits fixed by the company for such more hazardous occupation. The insured shall notify the company immediately in writing of any change in his occupation."

Anderson was killed on December 23rd, 1916, when, with a party of others, he was going from Ouray county to Delta, Colorado, to spend Christmas with his family. His death was caused by a snowslide, and at which time he was not in the employ of any one. The plaintiff in error contends that upon account of the non-forfeitable provisions above set forth, the judgment should have been for \$500.00 only, for the reason that prior to his death the deceased had changed his occupation from that of mine superintendent to a timberman, which it is agreed is a more hazardous risk. The court found, that the usual occupation, the life work or business of the deceased, was that of mine superintendent; that temporarily and for a few weeks preceding the accident, he had worked as a timberman; that on December the 22nd, 1916, the day be-

fore the accident, he quit such temporary employment, without intention of resuming the same, but with the intention of engaging in his usual occupation, that of mine superintendent, when he returned to work; that at the time of the accident, he had no occupation or employment in which he was actually engaged. There is abundant testimony to sustain this conclusion. The testimony of the manager of the company for whom the deceased had been temporarily working up to December the 22nd, discloses that on December 23rd, the day on which deceased met his death, he was not in the employ of the company; that for a few weeks prior to December 23rd, he had been working as a timberman; that it was thoroughly understood that such employment was temporary, and that he was given that employment in order that he might be held by the company so that he could, in a short time, resume the position of a mine superintendent, which was his usual occupation. There is other testimony to justify the finding that the defendant's real business was that of a mine superintendent. Had the accident, which was the cause of his death, happened when he was employed as a timberman, it would present a different question, and might come within the language in the policy relied upon, which reads: "If the insured suffers such injury while engaged in any occupation classified by the company as more hazardous than that herein given." When this accident happened, the deceased was not engaged as a timberman, the more hazardous risk, that was not his business, and he had no intentions of becoming thus engaged in the future, for which reasons we cannot agree that the plaintiff in error should only be holding for the smaller amount, because the deceased had theretofore temporarily been engaged in the more hazardous risk, when, as heretofore stated, it had nothing to do with the cause of his death, and when he had ceased to be thus engaged, and had no intention of again performing such labors. The reasoning in *Pacific Life Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087, in a way supports this conclusion. Perceiving no prejudicial error, the application for supersedeas will be denied and the judgment affirmed.

Supersedeas denied; judgment affirmed.

Decision *en banc*.

Mr. Justice Garrigues not participating.

No. 9373.

CARLSON v. AKEYSON.

1. APPEAL AND ERROR—*Findings Below—Effect*. Where the evidence heard below is a mere transcript of the testimony given at a former trial, the court of review is not concluded by the findings of the trial court.
 2. FRAUD—*False Representations Recklessly Made*, even though without knowledge of their falsity, entitles one who acts in reliance thereon, to his injury, to relief.
 3. — *Pleading*. One seeking the cancellation of a promissory note, the execution of which was obtained by fraud, need not always aver in express terms that he would not have executed the document but for the false representations.
- The complaint averring that plaintiff "relied upon the representations of defendant, and thereupon at request of defendants executed the note," with other allegations to like effect was held sufficient.
- If it is manifest that the false representations were material to the transaction this need not be expressly averred.
4. — *Tender of Thing Received by Plaintiff*, need not be expressly averred. Where, such tender being made at the trial it is refused by defendant upon grounds manifesting that it would have been refused, even if made previous to the institution of the action, the omission to make or aver a tender, in the beginning, was held unimportant.
 5. — *Plaintiff's Failure to Investigate*, excused, in view of the circumstance of the transaction shown in the record.

*Error to Alamosa District Court, Hon. A. Watson
McHendric, Judge.*

Mr. FRED D. STANLEY, Mr. W. W. PLATT, for Plaintiff in error.

Mr. JAMES D. PILCHER, Mr. ALBERT L. MOSES, for defendant in error.

Opinion by Mr. Justice Allen:

THIS is a suit which was brought by Mary E. Akeyson

against C. H. Price, A. W. Carlson, and the Public Trustees of Alamosa and Costilla counties, for the purpose of securing the cancellation of a promissory note and deed of trust given by the plaintiff to the defendant Carlson. The trial court rendered a judgment in favor of plaintiff. The defendant Carlson brings the case here for review, and asks that the writ or error herein be made to operate as a supersedeas.

Practically all of the evidence received at the trial consisted of a typewritten transcript of the testimony which had been given by the witnesses at a former trial of this case. Under this situation, we are not bound by the findings of the trial court in considering the main contention of the plaintiff in error, which is, that the judgment is contrary to the law and the evidence. *Hagerman v. Bates*, 30 Colo. 89, 94, 69 Pac. 526.

Upon a review of the evidence, and endeavoring to remain uninfluenced by the findings of the trial court, we are of the opinion that a preponderance of the evidence is in favor of the plaintiff, and that the judgment of the trial court is right.

The testimony discloses that some time prior to October, 1912, both the defendant Carlson and the plaintiff became interested in The Rio Grande Development Company, as a result of the efforts and representations of the defendant Price. In a pamphlet which Price gave to the plaintiff it was represented that

"The total number of acres owned by the Rio Grande Development Company is 80,000, and 20,000 acres of this is irrigable land that can be watered at a very small cost. * * * There is also mineral lands of great value included in the holdings of this Company. We have some valuable coal deposits in the mountains at the east of this land. The veins of coal are anywhere from 14 inches up to six feet in width."

The testimony warrants the inference that Carlson and Price, shortly prior to the date above mentioned, desired to obtain certain stock in the company which was held by one Gordon, at Spokane, Washington. Price was without

means, and Carlson was not willing to risk his money in the enterprise. The defendant Price induced the plaintiff, a woman without much business experience, to contemplate aiding him in securing the Gordon stock by giving a trust deed upon her land. This fact evidently became known to Carlson, through Price. Thereafter, and on or about October 31, 1912, Carlson came to the home of the plaintiff, and, according to the testimony of the plaintiff, assured her that the company had good title to the real estate which it assumed to own. Relying upon that assurance as well as upon the representations theretofore made by Price, the plaintiff delivered to the defendant Carlson the note and trust deed involved in this suit. It is claimed by the plaintiff in error, the defendant Carlson, that in consideration of the note and trust deed. Carlson advances \$3,000 to the plaintiff. The circumstances disclosed by the evidence, however, lead us to the conclusion that Carlson advanced no money whatever to the plaintiff, in any manner, but advanced the \$3,000 to the defendant Price, in the manner hereinafter mentioned. The money was deposited by Carlson himself in a local bank. The plaintiff had nothing whatever to do with the disposition or control of this money, and never received any of it. The bank itself regarded the deposit as a part of a transaction called by its cashier, "the Price-Gordon and Carlson deal." Only \$1,000 of this deposit was used in procuring the Gordon stock. The remaining \$2,000 was credited to the wife of the defendant Price, Mary E. Price, who does not appear to have been in any manner concerned with the transaction. Mrs. Akeyson, the plaintiff, received 10,000 shares of stock in the company, and the defendant Carlson received 15,000 shares, as a result of the "Price-Gordon and Carlson deal." The stock was worthless, and the plaintiff never received anything of value whatever for her note and deed of trust. The evidence warrants the conclusion that the company never owned the land which it claimed to possess, nor any part of it. If the defendant Carlson did not actually know this fact at the time he obtained the note and trust deed,

he nevertheless made his representations to the plaintiff in reckless disregard of their truth or falsity.

Notwithstanding the testimony given by Carlson in his own behalf, we are of the opinion that the evidence lends support to the theory of counsel for plaintiff, to the effect that Carlson advanced \$3,000 for the benefit of the enterprise or the company, hoping to profit greatly if the venture proved successful, and if a failure, intending to be fully protected and reimbursed by reason of the note and trust deed obtained from the plaintiff.

It is also contended by the plaintiff in error that the complaint fails to state a cause of action. The first ground for this contention is that

"it is nowhere stated in the complaint that when she (the plaintiff) signed the trust deed and note sought to be cancelled, the plaintiff acted in reliance upon any representations made to her by Price or Carlson."

Such allegations, however, need not always be made in express terms, and it is not necessary to allege expressly that plaintiff would not have taken the action which he or she did but for the false representations. 20 Cyc. 102. The complaint alleges that the plaintiff relied on the representations of the defendants, and that thereupon and at the request of the defendants, the plaintiff made, executed and delivered the note and trust deed in question, and by other allegations in the complaint it is clearly evident that the complaint alleges facts showing that plaintiff acted upon the alleged false representations to her damage. The complaint is good when tested by the objection above mentioned.

The second ground taken for insisting that the complaint fails to state a cause of action is that "it is not stated anywhere in the complaint that the representations set forth therein were material representations."

It is not necessary that there be an express averment to this effect. It is sufficient if it appear from the complaint, taken as a whole, that the representations related to a material fact and not to some mere collateral matter. We

find the complaint not objectionable on the ground last referred to.

In other respects we find the complaint good under the rules stated in *Kilpatrick v. Miller*, 55 Colo. 419, 135 Pac. 780, to which case the plaintiff in error calls our attention.

It is also urged that the complaint is defective because it

“shows that Akeyson (the plaintiff) has received a valuable consideration from Price (one of the defendants) for her money and no tender thereof prior to the commencement of this action is alleged, and no tender thereof is made in the complaint.”

The “valuable consideration” referred to consists of certain shares of stock in The Rio Grande Development Company. It appears from the complaint, and also from the evidence, that all the parties regard this stock as worthless. The record shows, furthermore, that at the trial the plaintiff tendered the stock in court, and thereupon the defendant Carlson declined the tender, on the ground that he never owned and never had any interest in the stock, and the defendant Price refused the tender “for reasons that he did not get the mortgage or note mentioned in the complaint, the return of which is demanded.” The decree provides that the stock be returned to the defendants. The circumstances above mentioned sufficiently show that a tender by plaintiff at any time would have been futile, and the stock declined by both above named defendants. The plaintiff in error was not, in the least degree, prejudiced by the failure of the plaintiff to make proper allegations with reference to tender, and is not entitled to a reversal of the judgment on any such ground.

Counsel for plaintiff in error also assert that “the complaint fails to state a cause of action in that it fails to show that plaintiff was in any manner prevented from investigating the truth of the representations made to her.”

Under the facts existing in this case, we do not think that there is merit in this contention. See *Zang v. Adams*, 23 Colo. 408, 411, 48 Pac. 509, 58 Am. St. 249.

The application for a supersedeas is denied and the judgment affirmed.

Affirmed,

Chief Justice Hill and Mr. Justice Bailey concur.

No. 8801.

TADLOCK v. LLOYD.

1. **APPEAL AND ERROR**—*Verdict upon Sufficient Evidence will not be Disturbed.* Action against a physician for neglect resulting in the death of the patient. Verdict for plaintiff. There being testimony to the effect that defendant had not exercised the care necessary, proper, and customary under the circumstances, the court refused to disturb a judgment for plaintiff.
2. **TRIAL**—*Questions for Jury.* In an action against a physician for negligence resulting in the death of the patient, the question whether the negligence was the proximate cause of the fatal result is for the jury.

Testimony examined and held sufficient to sustain the verdict. In considering this question the difficulty of procuring positive testimony as to the cause of death, that the code of ethics of the profession is frequently a bar to the securing of such testimony, is to be borne in mind.

3. **DAMAGES**—*Parents' Action for Child's Death—Experience of Jurors.* An instruction directing the jury to consider, in determining the allowance to the parent, the age, health, mental and physical condition, and the disposition and ability of the child to be of aid to the parent during its minority, as well as the probable expense of rearing and educating the child, and declaring that the jury were at liberty to refer to their personal observation, knowledge, and experience, in like cases, approved. The difficulties attending the inquiry set forth and enlarged upon.
4. — *Funeral Expenses of the Child,* are a proper element of damage, under the facts of this case.
5. **INSTRUCTIONS**—*Not Applicable to the Issue.* Action by parent for the death of a child, attributed solely to the neglects of the physician to give proper attention to his patient. An instruction that the possession of skill by the physician raises no presumption of its exercise, held not prejudicial, the question to which the instruction is directed not being involved.

Error to Mesa District Court, Hon. Thomas J. Black, Judge.

Messrs. WHEELER & WEISER, Mr. D. D. POTTER, for plaintiff in error.

Mr. W. S. FURMAN, Mr. JOHN F. HALDERMAN, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was brought to recover damages for alleged negligence on the part of a physician in failing to give proper attention to a patient. The jury returned a verdict for plaintiff for \$400.00. The case is here for review on error. The parties will be designated as below.

There are numerous assignments of error, but in substance they all go to the questions whether there was sufficient evidence to support the verdict; whether, if the negligence may be held to be proved, the evidence is sufficient to show that such negligence was the cause of death; and whether there is any evidence of actual damage upon which the jury could base a verdict.

Defendant, a physician, was employed by plaintiff, the father, to attend in sickness his child, a lad five years old. Evidence was produced to the effect that defendant called as requested the first time, and after rubbing his hand across the back of the child, and taking him by the arm, diagnosed the disease as scarlet fever. That no other examination was made, nor were instructions given as to the care to be given the child, except that some pills were left with the mother to administer, with directions to bathe the child frequently. Witnesses also testified that the day following the first visit of the physician he was requested to call and see the child again; that he failed to do so, making the statement that the disease must run its course; that on the next day he was called upon to visit the child in the morning, in the afternoon, and in the evening, and on each occasion, declined to make the visit, but later, after urgent request, came to the house, the child dying shortly after his arrival. There is also testimony to the effect that the defendant expressed regret for not having visited the child when first called that day, and in effect admitted that had he done so the life of the child might perhaps have been saved.

Defendant introduced testimony contradicting specific-

ally, and in detail, every material matter relied upon by plaintiff for recovery, thus making issues of fact the determination of which by the jury should not be disturbed by this court.

It is urged, however, that even though the negligence of defendant was established, there is nothing in the record to show that the death of the child was the proximate result of such negligence. There can scarcely be a question but that, by its verdict, the jury signified its belief that defendant was negligent in failing to give attention to the case. In *Jackson v. Burnham*, 20 Colo. 523, 39 Pac. 577, this court discussed the nature and extent of the obligation assumed by a physician in treating a patient, and on page 537 (39 Pac. 579) occurs the following:

"We think that the instructions, taken as a whole, correctly define the nature and extent of the obligation that a physician or surgeon assumes when he accepts employment in his professional capacity. They certainly embody the law on the subject as uniformly laid down by text writers and announced in the adjudicated cases. They state, in substance, that by holding himself out to the world as a physician and surgeon, he impliedly contracts that he possesses the reasonable degree of skill, learning and experience which good physicians and surgeons of ordinary ability and skill, practicing in similar localities, ordinarily possess."

At page 538 (39 Pac. 579) the court quotes with approval from *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107:

"Whether errors of judgment will or will not make a surgeon liable in a given case depends not merely upon the fact that he may be ordinarily skillful as such, but whether he has treated the case skillfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession."

There was expert testimony that defendant had not exercised the care and attention necessary, proper and usual under such circumstances. It is true that there was also expert testimony that he had done all that might reasonably be required. This, also, became a question of fact for the

jury, and its determination of it, there being ample evidence to support its conclusion, is binding upon us.

Speaking to the question of the obligation of a physician to his patient this court in *Bonnett v. Foote*, 47 Colo. 282, at page 285, (28 L. R. A. [N. S.] 136) said:

"In the absence of a special contract, the law implies that a surgeon employed to treat an injury contracts with his patient, first, that he possesses that reasonable degree of learning and skill which is ordinarily possessed by others of the profession; second, that he will use reasonable skill and ordinary care and diligence in the exercise of his skill and the application of his knowledge to accomplish the purpose for which he is employed; and third, that he will use his best judgment in the application of his skill in deciding upon the nature of the injury and the best mode of treatment."

Answering the contention of defendant that plaintiff failed to establish that the negligence alleged was the proximate cause of death it is to be observed that this also is a question, under proper instructions, for the jury. It is stated in 13 Cyc. 27, that:

"Within the rule which limits a recovery for injury to those damages which are its natural and proximate effects, the natural effects are those which might reasonably be foreseen, those which occur in the ordinary state of things, and proximate effects are those between which and the injury there intervenes no culpable and efficient agency. The matter is usually one of evidence which should be left for the decision of the jury."

It must also be remembered that the case at bar is not founded upon active malpractice, but upon the negligent failure to give proper care and attention to diagnosis and treatment of the patient. In 30 Cyc. 1578, this distinction is noted as follows:

"There is a fundamental difference in malpractice cases between mere errors of judgment and negligence in previously collecting data essential to a proper conclusion, or in subsequent conduct in the selection and use of instrumentalities with which the physician may execute his judg-

ment. If he omits to inform himself as to the facts and circumstances, and injury results therefrom, then he is liable."

It is clear that plaintiff predicates his action upon the theory that defendant failed to inform himself and give proper attention to the case. There is no claim that defendant did not possess skill, knowledge and experience in his profession, or that he made an error in diagnosing the ailment. If this were true the authorities cited by defendant would be decisive. It is in no sense an error of judgment, but an absolute failure to attend upon the patient and secure data upon which to base any judgment, that constitutes the ground of the complaint. There is abundant testimony that defendant made no effort to inform himself of the condition of his patient, or the progress of the malady, and if damage resulted therefrom he is liable.

In considering the amount of testimony to show that the death of the child was the proximate result of the alleged negligence, there must be taken into consideration the difficulty, if not the actual impossibility, of conclusively demonstrating the cause of death. The code of ethics among physicians is frequently a bar to securing positive testimony on questions such as are here involved. As was said in *Johnson v. Winston et al.*, 68 Neb. 430, 94 N. W., at page 609:

"We cannot overlook the well-known fact that in actions of this kind it is always difficult to obtain professional testimony at all. It will not do to lay down the rule that only professional witnesses can be heard on questions of this character, and then, in spite of the fact that they are often unwilling, apply the rules of evidence with such stringency that their testimony cannot be obtained against one of their own members."

There was expert testimony to the effect that the manner of examination, and the treatment of the child, was not that usually practiced; and, also, in answer to an hypothetical question, that the child died of uremic poisoning. There was similar testimony that affections of the kidneys may be, and frequently are, a result attendant upon scarlet fever. From the testimony of a lay witness the child

strangled to death from an accumulation of phlegm in its throat, and there was expert testimony that this condition also is to be guarded against in the progress of the disease. A non-professional witness also testified that the doctor said, as he was attempting to remove the obstruction from the throat of the child, "It's too late; I ought to have come when you called me."

In the syllabus in *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352, the proximate cause of an injury is held to be a question of fact:

"What is the proximate cause of an injury whether it be the original negligence of one party or the intermediate negligence of another party, is ordinarily a question of fact for the jury to be determined from the minor associated facts and circumstances."

The jury determined in this case that the proximate cause of the death of the child was the negligence of the defendant. There being testimony tending to support that conclusion this court should not interfere with the finding of the jury.

Error is assigned and vigorously urged to the giving of an instruction detailing matters to be considered in determining the amount of damages sustained. It is admitted that the instruction given states the abstract principle of law correctly, but it is said that it is not applicable because of lack of evidence to show any pecuniary damage or loss whatsoever to the plaintiff in the death of his son.

In brief, the instruction directs the jury to consider, in determining the loss, the age, health, condition in life, probable duration of life, mental and physical condition of the child, and his probable disposition and ability to assist plaintiff until his majority. Also a consideration of the probable expense of rearing and educating the boy. The jury were directed to determine these facts in the light of the evidence, in giving effect to which they were at liberty to apply their personal observation, knowledge and experience in like circumstances.

It appears that plaintiff proved the age of the boy, that his health previously had been good, and a photograph

showing his physical appearance was exhibited to the jury. No tables of mortality were introduced upon which to estimate the expectation of life. It is to be doubted, however, whether such tables would have been of aid in estimating the loss to the plaintiff, for, as said in 8 R. C. L. 643: "They show only the probable duration of life of healthy persons who are insurable risks, and not the duration of ability to work and earn money." In 13 Cyc. 216, it is said:

"While affirmative proof of the probable duration of life is admissible, such evidence is not absolutely essential, but the jury may arrive at a conclusion from evidence as to the health of plaintiff and the other facts of the case properly before them."

It is manifest that there can be no actual sum named as the equivalent for the services which the child might have rendered his parent, had death not occurred. The amount depends upon such a variety of circumstances and conditions that it can only be approximated after considering the age, health and condition in life of the child, and the probable amount that would have been expended upon him for maintenance and education during his minority. For the reason that items such as these are impossible of direct, positive proof by witnesses, they cannot be definitely fixed. They are analogous to damages for the loss of the companionship and services of a wife by a husband, which, in *Denver Consolidated Tramway Co. v. Riley*, 14 Colo. App. 133, 59 Pac. 476, that court declared were to be determined by the jury from their own observation, experience and knowledge, conscientiously applied to the facts and circumstances of the case. There is evidence to support the verdict, and therefore, the giving of the instruction, which is admitted correctly states the law, was proper, and is not subject to legal objection. It follows, therefore, that no error was committed in the giving of this instruction.

An instruction allowing the jury to consider the funeral expenses, approximately \$45.00, in arriving at their verdict, is also assigned as error. Whether funeral expenses may properly be considered in actions for death by wrongful act has never been determined in this state. Upon the

great weight of authority, however, under statutes like ours, permitting recovery of damages in such cases, funeral expenses are a proper element of damage, especially where, as in this case, the plaintiff, the father, was bound in law to assume and pay them:

Hollyday v. Steamer David Reeves, 5 Hughes 89, Fed. Cas. No. 6625; *Little Rock, etc., R. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44; *Augusta Factory v. Davis*, 87 Ga. 648, 13 S. E. 577; *Southern Ry. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793; *Louisville, etc., Ry. Co. v. Wright*, 134 Ind. 509, 34 N. E. 314; *Southern Indiana Ry. Co. v. Moore* (Ind. App. 1904) 71 N. E. 516; *Le Blanc v. Sweet*, 107 La. 355, 31 South. 766, 90 Am. St. Rep. 303; *Owen v. Brockschmidt*, 54 Mo. 285; *Rains v. St. Louis, etc., Ry. Co.*, 71 Mo. 164, 36 Am. Rep. 459; *Pack v. New York*, 3 N. Y. 489; *Houghkirk v. Delaware, etc., Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *Roeder v. Ormsby* (Sup. Ct. Spec. T.) 22 How. Prac. (N. Y.) 270; *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318; *Pennsylvania R. Co. v. Bantom*, 54 Pa. 495; *Pennsylvania R. Co. v. James*, 81 Pa. 194; *Missouri, etc., R. Co. v. Evans*, 16 Tex. Civ. App. 68, 41 S. W. 80; *Hedrick v. Ilwaco, etc., R. Co.* 4 Wash. 400, 30 Pac. 714; *Philby v. Northern Pac. Ry. Co.*, 46 Wash. 173, 89 N. W. 468, 9 L. R. A. (N. S.) 1193, 123 Am. St. Rep. 926, 13 Ann. Cas. 742.

Another instruction given, which stated that the fact that a physician is shown to have skill in his profession raised no presumption that he exercised such skill in a given case, would, if applicable, probably constitute error, for all persons are presumed to have properly performed the duties which imposed upon them by law. This instruction deprived defendant of such presumption. But it is to be noted that the action is founded solely upon the fact that the defendant failed and neglected to attend upon his patient, although urgently and repeatedly requested to do so. The case involves no question either of skill or the ex-

ercise of skill by defendant. The charge is one of deliberate neglect. The defendant gave no attention to the progress of the disease and failed to advise himself of the condition of his patient, or of the necessary treatment, according to testimony given, which the jury seems to have accepted as true. Upon all the facts disclosed by the evidence the instruction complained of had no application to the case and the giving of it does not support the claim of prejudicial error.

Judgment affirmed.

Decision en banc.

Mr. Justice Teller dissents. Mr. Justice Scott not participating.

Decided March 4, A. D. 1918.

Rehearing denied June 3, A. D. 1918.

No. 9017.

SCHWARTZ v. KING ET AL.

1. **WATER RIGHTS—Conditional Decree—Delay in Performing Condition.** By a general adjudication decree certain appropriators were awarded priority to a certain volume of water, absolutely, and to an additional volume, upon condition that with reasonable diligence they should bring under irrigation the residue of the land, the irrigation of which was proposed. After the expiration of ten years, their successors in title, having complied with this condition, applied for an order making absolute the conditional features of the decree. They were opposed by the defendant, a later appropriator, who contended that by reason of the long delay of plaintiffs, and their predecessors in title, they should, in any enlargement of the decree be subordinated to him. But defendant had never made any use of the water until the petitioners or their grantors had begun to bring the additional lands under cultivation. *Held* that, as to the defendant, there had been no abandonment of the right granted by the original decree.
2. — **Application of Water Awarded Conditionally—Reasonable Diligence.** What constitutes diligence varies with circumstances and the lands not under irrigation at the date of the original decree, and being practically deserted, while in the

hands of trustees and assignees, during the years of delay, the court applied the doctrine of *Weldon Company v. Farmers' Company* and *Conley v. Dyer* 43 Colo. 22, and refused to disturb the finding of the court below in favor of petitioners.

Error to Garfield District Court, Hon. John T. Shumate, Judge.

Mr. C. W. DARROW, for plaintiff in error.

Mr. A. L. BEARDSLEY, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

This is a review of a judgment on petition of C. A. King and others to have made absolute the conditional parts of a decree rendered in a water adjudication on May 5, 1888. The decree is a part of a general one adjudicating water rights in Water District No. 45. Protest was filed by Sheridan N. Schwartz in the court below, and upon trial the issues were found for the petitioners, with decree and judgment accordingly. The protestant brings the cause here for review on error. In this opinion he will be designated as defendant, and petitioners as plaintiffs.

Plaintiffs are the owners of the Talmadge and Gibson Ditch, taking water from East Divide Creek, in Water District No. 45. Their proprietries are numbered 36, dating from August 14, 1885, and calling for 372 cubic feet of water per minute of time; No. 49, on account of the first enlargement of said ditch, dating from April 10, 1886, calling for 315 cubic feet of water per minute of time; and No. 82, dating from July 9, 1887, calling for 100 cubic feet of water per minute of time being water for approximately 656 acres of land, under the general decree of May 5, 1888.

This general decree was absolute as to only 118 acres, and the balance contingent upon the bringing of the remainder of the land under irrigation with reasonable diligence. Plaintiffs set up that they had, with reasonable diligence, increased the irrigable lands under their ditch

to 450 acres, and prayed that this additional amount of water be made absolute, with 300 cubic feet of water per minute of time to priority No. 36, from August 14, 1885, and 240 cubic feet per minute of time to priority No. 49, as of date April 10, 1886.

Defendant is the owner of the Johnson Ditch No. 70A, and of priority No. 114A, calling for 72 cubic feet of water per minute absolutely, and six cubic feet conditionally, dated April 14, 1893, the decree for which was entered December 3, 1907, without notice to plaintiffs or others interested. He claims in substance that neither the plaintiffs nor their grantors have brought additional lands under cultivation with reasonable diligence, so far as his priority, No. 114A, is concerned; that by reason of the long delay, any relief granted them should be subject to his priority; since he has been making beneficial use of all the water adjudicated to him, long prior to the use by plaintiffs of any water for additional land. Upon hearing of testimony the conditional parts of the decree of May 5, 1888, were made absolute, according to the prayer of the petition, subject to prior appropriations, but not subject to that of defendant.

The only question to be determined is whether plaintiffs were reasonably diligent in making beneficial use of their conditional allotments of water. It appears that in 1888 and 1889 the lands for which the water was decreed were incumbered by trust deeds by their owners, for the benefit of an investment company, which later failed and made an assignment; and that the land passed to various trustees, assignees and successors in trust, who were non-residents, and who never were on the land. For the period of approximately ten years no new lands were brought under irrigation by any one. It then passed to others, who made beneficial use of the water upon increased acreage, until, at the time of the filing of the petition, water had been put to beneficial use upon approximately 450 acres.

Whether the lapse of practically ten years, during which time no use was made of the conditional allotments of water, may be considered as such an abandonment as to permit defendant to acquire the water for his use, need not be here considered, for the reason that his use of the water did not begin until after plaintiffs or their grantors had begun to bring additional lands under cultivation. So far as defendant be concerned, there was no abandonment of any of the rights secured under the decree of May 5, 1888. The doctrine announced in *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. Ap. 130, at page 135, 40 Pac. 1066, 1068, is applicable to the facts of this case, which is there thus stated:

"That the interval from 1882 to 1893 was presumptively too long must be conceded, were the reasons and circumstances unexplained * * * but how can that enure to the benefit of appellants? If, by neglect to apply the water within a proper time, the right to apply was forfeited, the water reverted, any one could proceed to appropriate and apply it; but such right could only attach while the right of the former claimant was in abeyance by reason of his negligence, and the second party must have availed himself of the right before the re-entry and prosecution of the enterprise by the first party. Unless, during the interim, when by failure to prosecute the enterprise the water rights may be regarded as having reverted, some party intervenes and makes a valid and legal appropriation of the water, the first party may resume, and if such resumption occurs before intervening rights attach, the right to appropriate is lost."

It is claimed on the part of defendant that plaintiffs did not begin to apply the water until after he had commenced to use it. This question being disputed, the conclusion reached by the trial court against the defendant will not be disturbed, there being ample evidence to support it.

As to whether, after the land was again put into cultivation, plaintiffs or their grantors used reasonable diligence in

applying the conditional allotments of water, it may be said that what constitutes reasonable diligence varies in each particular case, with the attendant facts and circumstances. Here, because the land was practically deserted while in the hands of the assignees and trustees, the doctrine announced in *Weldon Co. v. Farmers Co.*, 51 Colo. 345, 119 Pac. 1056, should be applied. In that opinion it is said at page 459:

"It is impracticable, if not impossible, for a settler to seed and irrigate 160 acres of sod breaking a year. Settlers on the public domain are usually poor men, and cannot do all this at once, even if it were possible. It is a continuing process, requiring a number of years * * * The test is not necessarily the number of acres irrigated each year. If these tracts were farmed, and all the water necessary was beneficially used with reasonable diligence in the improvement of the land, it is sufficient."

And also to the same effect from *Conley v. Dyer*, 43 Colo. 22, at page 29, 95 Pac. 307:

"What constitutes due diligence and what is a reasonable time depend, of course, upon many circumstances; and one adjudication cannot be taken as a test by which to determine these matters in another trial, for the reason that the circumstances are never precisely the same in both."

The question of due diligence, as well as questions upon other material and essential facts, were sharply in dispute. All were resolved in favor of the petitioners. We find nothing in the record which warrants a reversal of the findings of the court upon the facts involved. The judgment should therefore be affirmed, and it is so ordered.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9044.

BALDWIN v. SCOTT ET AL.

APPEAL AND ERROR.—*What May be Assigned for Error.* Instructions given, to which no objection was made or exception taken below, will not be considered.

Nor will a question not presented by the pleadings, nor suggested at the trial.

Error to the Mesa District Court, Hon. Thomas J. Black, Judge.

Mr. L. L. MORRISON, for plaintiff in error.

Messrs. GRIFFITH, WATSON & SMITH, for defendants in error.

Mr. Justice Garrigues delivered the opinion of the court.

This action in replevin was brought by Jessie H. Baldwin in the County Court of Mesa county, against Theodore Scott and Jeff Watson, as sheriff, to recover possession of an automobile.

The sheriff levied on the machine as the property of plaintiff's husband, under an execution issued upon a judgment obtained by defendant Scott against him.

A trial in the County Court resulted in favor of defendants and on appeal, the same result was reached in the District Court and plaintiff brings the case here for review.

Error is assigned on the instructions given, and it is contended the evidence is insufficient to sustain the verdict.

1. No objection was made or exception reserved to the giving of any instruction by the trial court, therefore they cannot be considered here.

McPhail v. City, — Colo. —, 163 Pac. 861; *Manzoli v. People*, — Colo. —, 169 Pac. 144; *Dourte v. Shirey*, — Colo. —, 172 Pac. 423.

The question of estoppel argued by counsel for plaintiff in error, will not be considered, because it is not involved in the pleadings and was not considered on the trial.

2. The sufficiency of the evidence to sustain the judgment, is a question which requires a review of the testimony.

Plaintiff and her husband testified that Mrs. Baldwin purchased the automobile from a man named Lane, with money which she had inherited from her father's estate, amounting to some \$2,800.00; but when she described the alleged transaction and method of payment, it seems that the machine was paid for by a check for \$200.00, and a deed to two lots valued at \$800.00, each executed and delivered to Lane by The Udlock Investment Company, by which company Mr. Baldwin was employed, and of which he was secretary. She testified that she reimbursed the company by giving it a mortgage on her property for \$1,400.00. No documentary evidence covering any of the alleged matters was presented on the trial. The testimony of the husband describing the transactions, is very much involved, and not at all clear to us, but as we understand it, is to the effect that Mrs. Baldwin held the company's note for \$1,400.00, and that she owed it two notes of \$200.00 each, and that when the company paid \$1,000.00 for the automobile, that cancelled the indebtedness between them, and she became the owner of the machine.

It appears from the evidence of the defense that Mr. Baldwin had entire charge of, and drove the car. Mrs. Baldwin never drove it. Mr. Udlock drove it, and it was often used in connection with the business of the company by Mr. Baldwin. The applications for licenses for the auto were always made by him in his own name, in writing, were under oath, and stated that he was the owner of the car. He filled out and swore to the tax schedules in which the automobile was listed as the joint property of himself and wife and he paid all the taxes. When the auto was levied on under execution by the sheriff, the officer asked Baldwin, in front of whose place of business the machine was standing, if that was his car, and Baldwin replied

that it was. This, in brief, is the evidence upon which the jury based its verdict against the plaintiff and in favor of defendants. The determination of the case involved the weight of the testimony and credibility of witnesses, which questions were exclusively for the jury to settle under the instructions of the court. Upon the record presented, we can not say, as a matter of law, that the evidence is insufficient to support the verdict and judgment based thereon. The judgment of the lower court is therefore affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice Scott concur.

No. 9037.

CITY OF LOVELAND v. WESTERN LIGHT & POWER COMPANY.

1. MUNICIPAL CORPORATIONS—*Electric Light Works—Election to Authorize.* At an election held under c. 153 of the Acts of 1899 (Rev. Stat. sec. 6525, cl. 67) only tax payers of the city are entitled to vote. A taxpayer of the county residing within the city, but paying no tax on property within the city, is not entitled to vote.
2. ELECTION—*Irregularities not Affecting Result Disregarded.* At a municipal election certain citizens of the town were refused the ballot, but if all had voted in the negative, and their votes had been accepted and counted, the proposition still would have carried. Held their exclusion was no ground to set aside the result.

Error to Larimer District Court, Hon. Robert G. Strong, Judge.

Messrs. PERSHING, TITSWORTH & FRY, Mr. ROBERT G. BOSWORTH, Mr. AB H. ROMANS, for plaintiffs in error.

Messrs. LEE & SHAW, Mr. E. E. WHITTED, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

THIS suit was brought to enjoin the City of Loveland, plaintiff in error, defendant below, from issuing and dis-

posing of electric light bonds to the amount of \$79,000.00.

At a special city election held in Loveland August 11, 1914, under sec. 1, p. 419, Laws of 1899, the city authorized the city council to erect a municipal electric light plant, to be owned and operated by the city, and at the general city election following, held April 6, 1915, under sec. 1, p. 386, Laws of 1891, authorized the city council to issue bonds aggregating \$79,000.00 to erect the plant, and May 16, 1916, the city council passed an ordinance providing for issuing the bonds. Thereupon this suit was begun, the purpose being to prevent by injunction the carrying out of the authority granted. The court found that the special election held on August 11, 1914, in the city of Loveland, upon the question of the city erecting an electric light plant, was in all respects properly submitted and carried, and was valid, and authorized the city council to erect an electric light plant for the city, but enjoined the city from issuing the bonds, because, as it held, the amount exceeded the limit of indebtedness which could be created by the city. The city sued out a writ of error to review this judgment, and assigned errors assailing the action of the court in holding the bonds could not be legally issued, and the Western Light & Power Company, plaintiff below, as defendant in error, assigned cross errors, claiming that the court erred in holding the election of August 11, 1914, authorizing the erection of the light plant, was valid.

During the pendency of the writ of error, the legislature, by amending the law, did away with the limitations upon the city, and another election was held April 3, 1917, at which a valid bond issue of \$83,000.00 was authorized. The city thereupon had no further interest in prosecuting the writ of error, and we dismissed the suit upon its motion, but later reinstated the cause upon the cross errors assigned by the Western Light & Power Company. (See *City v. Western Co.*, Colo., 170 Pac. 191.) The case is now here upon the cross errors assigned by the company, with respect to the validity of the city election held August 11,

1914, purporting to authorize the city council to erect a municipal electric light plant.

The constitution provides that no city shall contract any debt by loan in any form unless the question of incurring the same shall be submitted at a regular city election to a vote of such qualified electors of the city as shall in the year next preceding have paid a property tax therein and a majority of those voting on the question shall vote in favor of creating such debt.

Art. XI, sec. 8, Constitution.

The act of 1891 provides that no indebtedness on behalf of the city shall be contracted by borrowing money or issuing bonds for the purpose of constructing a plant to supply electric light for the city unless the question of incurring the same shall, at a regular city election, be submitted to a vote of such qualified electors of the city as shall, in the year next preceding, have paid a property tax therein, and a majority of those voting thereon shall vote in favor of creating such debt.

Laws of 1891, p. 386.

The act of 1899 provides that no electric light works shall be erected unless a majority of the voters of the city who are taxpayers under the law, voting on the question at a general or special election, shall by vote approve the same.

Laws of 1899, p. 419.

The act of 1909 provides: "The term taxpayer, taxpaying elector or qualified elector shall be held to mean and include only those persons who are qualified voters under the registration and election laws of this state, and who, in the calendar year in the last preceding election at which said vote was offered, shall have paid a tax, or be liable for the payment of such tax, upon real or personal property assessed to them and owned by them in the county where such vote is offered."

Laws of 1909, p. 511.

Defendant in error contends that the city council is without power to erect an electric light plant because the elec-

tion held August 11, 1914, is void on account of the errors in the ordinance calling the election and errors in the published election notice issued thereon and in the conduct of the election.

Sec. 9, of the ordinance calling the election, and the published notice, contained the following provisions:

"At said election only such voters of the City of Loveland as are taxpayers under the law will be permitted to vote upon the question submitted. The term "taxpayer" means and includes only those persons who are qualified electors under the registration and election laws of the State of Colorado, and who, in the calendar year last preceding the said special election, shall have paid a tax upon real or personal property assessed to them and owned by them in the City of Loveland, where such vote is offered. (See Chapter 213 of the Session Laws of Colorado, 1909.)"

Opinion.

The laws of 1909, sec. 1, p. 511, referred to in the notice, contain no provisions regarding the calling or holding of such an election. The election was called and held under the provisions of sec. 1, p. 419, Laws of 1899, which provides that no municipal electric light works shall be erected by the city until a majority of the voters of the city "who are taxpayers under the law," voting on the question, by vote approve the same. It is claimed by defendant in error that a certain class of registered voters residing in the City of Loveland, who were taxpayers in Larimer County, but not taxpayers of the city, were, on account of the ordinance and notice, prohibited from voting. The complaint, made to the form of the notice, is that the words, "City of Loveland," should have been "County of Larimer," the contention being that under chapter 213, Laws of 1909, every registered elector of the City of Loveland had a right to vote upon the proposition if he was a taxpayer of Larimer County, although he paid no taxes upon any property in the City of Loveland, and that the language of the ordinance and notice prohibited such persons from voting.

If the notice had contained the words, "Who are taxpayers under the law," instead of "City of Loveland," it would not have conferred the right to vote upon any one except taxpayers of the city. In other words, only taxpayers of the city were entitled to vote upon the proposition. Chapter 213, Laws of 1909, did not give registered electors of the city, who paid taxes in Larimer County, but who did not pay taxes on property in the city, the right to vote on the question. It was the intention of the legislature to submit the question of the city erecting, owning and operating its own municipal light plant to the taxpayers of the city. But, aside from this, only one such person offered to vote and was refused. Thirty-four others resided in the city, possessing the same qualifications as this one, but none of them offered to vote. The proposition carried by a majority of eighty-four, so if all of them had offered themselves and had been permitted to vote and had all voted against the proposition, it would not have changed the result. An election will not be set aside for irregularities unless they affect the result of the election. *People ex rel. v. Keeling*, 4 Colo. 129-133; *Kellogg v. Hickman*, 12 Colo. 257, 21 Pac. 325; *Todd v. Stewart*, 14 Colo. 286-288, 23 Pac. 426; *Allen v. Glynn*, 17 Colo. 338-347, 29 Pac. 670, 15 L. R. A. 743, 31 Am. St. Rep. 304; *Smith v. Harris*, 18 Colo. 274-277, 32 Pac. 616; *People v. Earl*, 42 Colo. 238, 94 Pac. 294; *Littlejohn v. People*, 52 Colo. 217-226, 121 Pac. 159, Ann. Cas. 1913D, 610; *Murphy v. City*, 64 Wash. 681, 117 Pac. 476.

We hold that the cross assignments of error of the Western Light & Power Company are not well taken, and the finding of the trial court, that the election of August 11, 1914, was regular and valid, is sustained.

Judgment affirmed.

Chief Justice Hill and Mr. Justice Scott concur.

No. 9134.

DENVER SANITARIUM & HOSPITAL ASSOCIATION v. ROBERTS,
ET AL.

1. APPEAL AND ERROR—*Questions Considered.* Matters alleged of which there is no evidence are not considered.
2. MORTGAGE—*Parol to Establish.* An absolute conveyance of land may be shown by parol to be intended to be a mere security; but the evidence must be clear, certain, unequivocal, and convincing.

Error to Denver District Court, Hon. Geo. W. Allen, Judge.

Mr. J. T. MACEY and Mr. L. O. WAVLE, for plaintiffs in error.

Mr. L. WARD BANNISTER, Mr. LEROY MCWHINNEY and Mr. SAMUEL M. JANUARY, for defendants in error.

Mr. Justice Scott delivered the opinion of the court.

PLAINTIFFS in error were plaintiffs below. The complaint alleges that on the 30th day of November, 1912, and for a long time prior thereto, the plaintiffs were the owners of Block 41, P. T. Barnum's subdivision to the City of Denver. That on said date the plaintiffs were indebted to the defendant, John G. Roberts, in the sum of \$6,000, and some interest thereon. That for the purpose of securing the payment of such sum, the plaintiffs on said day executed and delivered to the said Roberts a warranty deed. That at the time of the execution and delivery of the warranty deed, it was expressly agreed between the parties that said warranty deed was to operate as a mortgage only, and that the plaintiffs should have the right to redeem said property upon the payment to Roberts of the sum of \$5,000, and the further sum of \$250, which Roberts had paid as taxes assessed against the property. Further allegations were made as to a conspiracy upon the part of the defendants to defraud plaintiffs of their title to the property. No proof was offered upon this question and it is not a factor in the case. The execution and delivery of the deed

was admitted, and it was alleged in the several answers that the deed was, and intended to be, an absolute conveyance.

The trial court rendered judgment in favor of the defendants and dismissed the action.

There is simply one question, and that is one of fact, was the warranty deed absolute in form, intended by the parties as a mortgage, and not an absolute conveyance.

The admitted facts are that at the time of the execution of the deed the defendant Roberts held a mortgage covering the premises to secure the payment of the sum of \$6,000, then due and unpaid. That Roberts had instituted proceedings in foreclosure, and the trial had been postponed from time to time to give plaintiffs an opportunity to make payment. Finally Roberts insisted on trial of the action, and he and his witnesses, who were lawyers who had attended to the business for all the parties, testify that it was agreed between the parties that the plaintiffs should execute an absolute deed to the premises to Roberts, the foreclosure suit was to be dismissed, and Roberts was to execute a lease to the plaintiff, May K. Lewis, for a stated period, with an option upon her part to purchase the premises within a given time for the sum of \$5,000. All these things were done. Roberts was formally placed in possession as owner, and afterward Lewis took possession and occupied the premises under her lease.

This is admitted by plaintiffs, but they contended that there was a verbal understanding between the parties that the deed was executed and possession given to Roberts, and the lease to plaintiff, merely for the purpose of getting some undesirable tenants from the premises, and that the deed was intended merely as security for the sum of \$5,000, instead of the larger sum due on the mortgage then in process of foreclosure.

We think the court's finding for the defendants is amply sustained by the evidence, and under the general rule will not be disturbed.

The plaintiffs clearly failed to sustain their contention under the rule of this court repeatedly stated as to the degree of proof required in such cases. Upon this point it was said in *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79:

"The equitable rule that an absolute deed may be shown by parol to be in effect a mortgage has, in this state, received express legislative recognition. Civil Code, § 261. But it should be observed that, to establish this fact, the proof must be clear, certain, satisfactory, unequivocal, trustworthy, convincing and, some cases say, conclusive; in short, as stated in some former decisions of this court, the case must be made out with that fullness and precision which is essential to a conviction in a criminal case—beyond a reasonable doubt—*Whitsett v. Kershow*, 4 Colo. 419; *Graff v. Town Co.*, 12 Col. Ap. 106, 54 Pac. 854; *Townsend v. Petersen*, 12 Colo. 491, 21 Pac. 619; *Armor v. Spalding*, 14 Colo. 302, 23 Pac. 780; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70; *Butsch v. Smith*, 40 Colo. 64, 90 Pac. 61; *Enos v. Anderson*, 40 Colo. 395, 93 Pac. 475, 15 L. R. A. (N. S.) 1087.

We think the preponderance of the testimony establishes that the deed was given by plaintiff and accepted by Roberts in satisfaction of the mortgage and precedent debt, with the further agreement for lease, and option to repurchase, upon the payment of the sum of \$5,000 and taxes, theretofore paid by Roberts. This was a permissible and valid agreement.

Upon this point the last case cited quoted and approved the following from *Henley v. Hoatling*, 41 Cal. 27:

"There can be no question that a party may make a purchase of lands either in satisfaction of precedent debt or for a consideration then paid, and may at the same time contract to reconvey the lands upon the payment of a certain sum, without any intention on the part of either party that the transaction should be, in effect, a mortgage. There is no absolute rule that the covenant to reconvey shall be

regarded, either in law or equity, as a defeasance. The covenant to reconvey, it is true, may be one fact, taken in connection with other facts, going to show that the parties really intended the deed to operate as a mortgage; but standing alone, it is not sufficient to work that result. The owner of the lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms; and if such appears to be the intention of the parties, it is not the duty of the court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal; and courts would depart from the line of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage."

The judgment is affirmed.

Hill, C. J., and Garrigues, J., concur.

No. 8817.

WEDMAN ET AL. v. CARPENTER ET AL.

JUDGMENT—*Lien of*, stands upon the same footing as that of a purchaser in good faith; and upon the question of good faith the judgment creditor and the purchaser are subject to the same tests.

2. NOTICE—*Recorded Conveyance of Lands*, is notice only as to the land therein described. As between an innocent purchaser for value, and one who has accepted a mortgage containing a false description, the former is preferred.
3. BONA FIDE PURCHASER—*Protected in Equity*. Equity will not reform an instrument to the injury of a *bona fide* purchaser.

Error to Alamosa District Court, Hon. Jesse C. Wiley, Judge.

Mr. CHARLES M. CORLETT, Mr. GEORGE M. CORLETT and Mr. ARTHUR HOUSTON, for plaintiff in error Wedman; Mr. CHARLES D. HAYT, JR., pro se, for plaintiffs in error.

Mr. ALBERT L. MOSES, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THE plaintiff was the owner of lands described as the south half of Section 31, Township 38, North of Range 9, East, in Conejos County, subject to an incumbrance of \$2,500. On February 11th, 1911, plaintiff sold and conveyed the lands by warranty deed to C. Carpenter, subject to the mortgage upon which had then been paid the sum of \$1,000.

Carpenter, as a part of the purchase price, executed and delivered to plaintiff a deed of trust to the Public Trustee, to secure a sum represented by three notes payable to plaintiff, and due at different times, aggregating the sum of \$3,400. It was intended by the parties that the deed of trust was to cover the identical lands purchased, but by error of the scrivener, the deed was made to cover the south half of Section 31, Township 37, North of Range 9 East, instead of Township 38, as was intended. All instruments were properly recorded.

Subsequently Carpenter sold the southwest one-quarter of Section 31, Township 38, North of Range 9 East, to Geo. J. Hills, subject to one-half of the amount secured by the two mortgages, then supposed to cover the entire half section of land. Later the said Hills sold the said southwest quarter section to Winfield Marvel, and conveyed the same by warranty deed, without mention in the deed of the Wedman indebtedness, or the trust deed given to secure it.

Subsequently, and before the institution of this suit, Marvel died, and under his will, his widow became the legal holder of the tract. On the 21st day of October, 1913, in the District Court of Conejos County, Chas. D. Hayt, plaintiff in error, obtained a judgment against Carpenter and another, in the sum of \$2,218.33. October 25, 1913, a duly certified transcript of said judgment was filed with the Clerk and Recorder of Conejos County, and it is claimed that judgment became a lien on the real estate of Carpenter, particularly the south half of Section 31, Township 38, North of Range 9 East.

This suit was instituted in December, 1913, and is to reform the trust deed, so as to conform to the description of the lands intended by the parties at the time, and to foreclose said trust deed as a mortgage upon the lands so intended to be described therein. The contention of the plaintiff is that his claim under the trust deed is superior to the claim of Marvel under the deed, and likewise to that of Hayt under his judgment lien. All parties thereto, except Hayt, were non-residents of the State of Colorado at the time of the several transactions.

The court found that Marvel was an innocent purchaser in good faith, and rendered judgment in favor of Mrs. Marvel, from which the plaintiff has sued out his writ of error. The court further found that Hayt had full notice of the claim of plaintiff, and the mistake made in the trust deed, and that therefore his interests were subject to the claim of plaintiff under the trust deed, which he caused to be reformed by the judgment in favor of plaintiff and against Hayt, who sues out his writ of error as relates to this part of the judgment.

The testimony is clear that Marvel had no sort of actual notice of the existence of the trust deed, at the time of his purchase, and that he acted in entire good faith. There is not a scintilla of testimony to indicate that Hayt had actual notice of the existence of the mortgage at the time of filing his transcript of judgment, so that the court could only have found that he was bound by constructive notice.

It is true that Hills, who purchased the Marvel quarter section from Wedman, had actual notice of the facts, and is bound by such notice as against the plaintiff.

It is settled in this state that the lien of a judgment creditor stands upon the precise footing as that of an innocent purchaser or encumbrancer in good faith, subject to the same tests as to good faith and regularity generally. *Western Chemical Co. v. McCaffery*, 47 Colo. 397, 107 Pac. 1081, 135 Am. St. 234.

The trust deed, with the erroneous description, was recorded on April 5th, 1911. This proceeding in reformation and foreclosure was not instituted until December, 1913, and there is no evidence in this case tending to show that either Marvel or Hayt had actual notice of its existence before the latter date. The recorded deed of trust was constructive notice only as to the lands described therein, and none other. It was said in *Carroll v. Kit Carson Co.*, 24 Col. Ap. 217, 133 Pac. 148:

"A deed duly recorded is constructive notice of its existence, and of its contents, to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons. 3 Wash. R. P., 319, Sec. 53. In the case of *Maul v. Rider*, 59 Penn. 167, Sharswood, J., says: 'That the record of a deed is constructive notice to all the world, is too broad an enunciation of the doctrine. Such record is constructive notice only to those who are bound to search for it, as subsequent purchasers and mortgagees, and all others who deal with it on the credit of the title in the line of which the recorded deed belongs.' *Gillett et al. v. Gaffney et al.*, 3 Colo. 366, cited in *Smith v. Russell*, 20 Col. Ap. 554, 80 Pac. 474, and in *Judd v. Robinson*, 41 Colo. 222, 229, 92 Pac. 724, 124 Am. St. 128, 14 Ann. Cas. 1018.

It is well settled in this jurisdiction that the rights acquired by *bona fide* purchaser of real estate, without notice of an unrecorded deed, are not measured by the actual interest of the seller in the land, but rather by his apparent interest. *Hallett v. Alexander*, 50 Colo. 37, 114 Pac. 490, 34 L. R. A. (N. S.) 328, Ann. Cas. 1912 B 1277. As between the negligent incumbrancer and an innocent purchaser for value, the former must suffer.

It has been uniformly held that the right of a court of equity to decree a reformation of an instrument does not extend to reforming such instrument to the injury of a *bona fide* purchaser without notice. *Flanders v. O'Brien*, 46 Ind. 284; *Pence v. Armstrong*, 95 Ind. 191; *Nelson v.*

Spence, 129 Ga. 35, 58 S. E. 697; *Burner v. Higman Co.*, 133 Iowa 315, 110 N. W. 580; *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; *Sentell v. Randolph*, 52 La. Ann. 52, 26 South. 797; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 789; *Goodbar v. Dunn*, 61 Miss. 618. And in *White v. Denman*, 16 Ohio 59, it was held that this doctrine must be applied to a defectively executed mortgage as against a subsequent judgment lien.

The judgment as to Marvel is affirmed, and the judgment as to Hayt is reversed, with instruction to enter judgment in his favor in accordance with the views herein expressed.

The judgment is affirmed in part and reversed in part with instructions.

En banc.

No. 9027.

ELWELL v. DICKSON ET AL.

APPEAL AND ERROR—*Findings in Conflicting Evidence*, will not be disturbed

Error to Denver District Court, Hon. Geo. W. Allen, Judge.
Department.

Mr. CHAS. F. MILLER, for plaintiff in error.

Mr. RICE W. MEANS and Mr. T. E. MCINTYRE, for defendants in error.

Opinion by Mr. Justice Teller.

Plaintiff in error brought suit against defendants in error on a promissory note executed in the names of The Western Uniform Company and The Hecho Waterproof Garment Company, the complaint alleging that the individual defendants were partners doing business under the corporate names mentioned.

Trial to the court, and judgment for defendants.

The only errors argued are in the failure of the court to find for the plaintiff, etc.

Plaintiff relied upon certain bill heads and some alleged admissions of one of the defendants to establish the fact of the partnership; and the individual defendants testified that they were never partners.

Upon this state of the evidence we can not interfere with the court's findings of facts. The judgment is, therefore, affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice White concur.

No. 9010.

LEACH v. FULLER ET AL.

SPECIFIC PERFORMANCE—*Contract to Lend Money*, cannot be specifically enforced.

Error to Denver District Court, Hon. Geo. W. Allen, Judge.
Department.

Mr. FREDERICK T. HENRY and Mr. CARLISLE FERGUSON,
for plaintiff in error.

Mr. WILLIAM H. DICKSON, for defendant in error, D. P.
Fuller, Jr.

Opinion by Mr. Justice Teller.

THIS cause is before us on error to a judgment of the District Court decreeing specific performance of a contract by which the plaintiff in error agreed to loan defendant in error, Fuller, \$1,000, to be secured on 320 acres of land in Arkansas, on condition that the title thereto be found good, etc.

Fuller, the plaintiff in the action, in his complaint, set out the contract in *haec verba*; alleged that an abstract of title had been prepared, showing title as required by the agreement; that he had performed all the conditions of the agreement, including the execution and recording of the mortgage; and that the defendant refused to indorse a cashier's

check drawn to her order for \$1,000, and held in escrow by defendant Nicol.

The prayer was that defendant Leach be ordered to indorse said check, and that defendant Nicol be directed to deliver the same to the plaintiff.

The answer of defendant Leach contained a demurrer, on the ground, among others, that the complaint alleged no facts showing that the plaintiff had not an adequate remedy at law; and that an action for the specific performance of a contract to loan money would not lie. It also alleged that said defendant was induced to sign the contract by misrepresentation, in that the land offered as security for the loan was stated to be worth from \$10 to \$15 per acre, and well timbered, all of which was false, and known to plaintiffs so to be.

The demurrer was overruled and the cause tried to the court.

The demurrer should have been sustained.

The ground of jurisdiction to compel specific performance of an agreement is that the party seeking this relief can not be fully compensated by an award of damages at law. *Frue v. Houghton*, 6 Colo. 318. Some special circumstances must exist to take the case out of the general rule that the remedy for breach of contract is by an action for damages.

Here there is nothing alleged in the complaint, nor has counsel in argument suggested anything from which it appears that the plaintiff may not be fully compensated in damages for all his losses by reason of the breach of contract. The burden is upon him to show that the ordinary remedy is not sufficient.

The rule is that "an agreement to lend money, whether on security or not, can not be specifically enforced." 36 Cyc. 556; *Pomeroy's Equity Juris.*, Vol. 6, Sec. 753. To the same effect: *Conklin v. People's Bldg. Ass'n.*, 41 N. J. Eq. 20, 2 Atl. 615, and *Bradford, etc., R. Co. v. New York, etc., R. Co.*, 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116.

In *Rogers v. Challis*, 27 Beavan's Reports 175, an attempt was made to compel the performance of a contract to borrow money. In the opinion it is said:

"By what possibility can it be said that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, 'I have sustained a pecuniary loss by my money remaining idle.' * * *. This is a mere matter of calculation, and a jury would easily assess the amount of damage which the plaintiff has sustained."

In this case it was further said that it would be productive of serious evil to permit a remedy by suit for specific performance where an action for breach of contract would give full relief, since it would present for trial by the court a case which should be tried by a jury.

So, here, if the plaintiff has suffered damage by the refusal of defendant Leach to make the loan, if there were a valid contract to make it, he can easily prove the extent of his loss.

The judgment is accordingly reversed.

Judgment reversed.

Chief Justice Hill and Mr. Justice White concur.

No. 8997.

O'BRIEN v. GALLEY-STOCKTON SHOE COMPANY.

1. HUSBAND AND WIFE—*Living Apart—Family Expenses*. Where the wife lives apart from the husband, with the children, the liability of the husband for raiment furnished to the children without his authority, depends upon common law principles; the statute regarding family expenses (Rev. Stat. sec. 3021) has no application.
2. DIRECTED VERDICT—*Motion for—Effect*. Where neither party requests the submission of any fact to the jury, each moving for a directed verdict, the decision of the trial court has the effect of a general verdict upon all the matters in issue. Upon error brought, the weight of the evidence is not considered. If there is any substantial evidence to support it, and no error in the admission or the rejection of testimony is discovered, the judgment is affirmed.

*Error to Fremont County Court, Hon. Kent. L. Eldred,
Judge.*

On Rehearing.

Mr. D. W. ROSS, for plaintiff in error.

Messrs. JEFFREY & STINEMEYER, for defendant in error.

Opinion by Mr. Justice Allen:

THIS is an action brought by The Galley-Stockton Shoe Company, plaintiff below, against James O'Brien, defendant below, to recover the sum of \$31.05 alleged to be due on a bill, principally for shoes claimed to have been furnished to the defendant's minor children.

The cause was tried to a jury, and after evidence was produced on behalf of each party, and at the close of the testimony, the defendant moved for a directed verdict. The motion was denied, and thereupon the plaintiff moved for a directed verdict in its favor and against the defendant. The latter motion was sustained, and judgment was rendered in favor of plaintiff for the amount of its claim. The defendant brings the case here for review, and the principal question presented is whether or not error was committed in overruling defendant's motion and sustaining plaintiff's motion for a directed verdict.

It is claimed by the defendant in error, and denied by the plaintiff in error, that the defendant below is liable under the statute (section 3021 R. S. 1908, section 3460 Mills Ann. Sts. 1912). The evidence is undisputed that at the time the goods were furnished and used, the children, with their mother, the wife of defendant, were and had been living separate and apart, and in a different house, from the defendant. Under such circumstances the statute above cited has no application in this case. *Gilman v. Matthews*, 20 Col. Ap. 179, 77 Pac. 366; *Denver Dry Goods Co. v. Jester*, 60 Colo. 290, 152 Pac. 906, L. R. A. 1917A 957. The controversy is, therefore, controlled by the principles of the common law, on which the plaintiff below also relied.

The rule at common law is thus stated in 29 Cyc. 1608:

"It is a necessary consequence of the duty to support the child that the parent may in a proper case be held liable for necessities furnished to the child by a third person; but in order to hold a parent liable there must be either an express promise to pay or circumstances from which a promise can be implied, some clear and palpable omission of duty on the part of the parent, or some special exigency rendering the interference of such person reasonable and proper."

It is conceded that there was no express promise on the part of the defendant to pay for the goods, and that the wife or children had no express authority to purchase the goods on the credit of the defendant. The defendant's liability depends on whether or not the plaintiff furnished the articles under circumstances from which a promise can be implied.

Whether circumstances creating a liability on the part of the defendant existed at the time the defendant's children obtained the goods was a question of fact. Since both parties, at the close of the testimony, moved for a directed verdict, and neither of them, after a ruling on such motions, requested the submission of any question of fact to the jury, the decision of the trial court has the effect of a general verdict, and is a finding upon all fact questions, in favor of the successful party. In such case the Appellate Court does not consider the weight of the evidence. If no reversible error was committed in the admission or rejection of evidence, the directed verdict will be upheld if there is any substantial evidence to support it. *Saxton v. Perry*, 47 Colo. 263, 268, 107 Pac. 281. While the plaintiff in error contends that there is an absence of evidence to support a verdict against defendant below, we do not agree with this contention, but are of the opinion that there is sufficient evidence to support the finding and judgment.

The remaining question argued concerns the rejection of certain evidence. We find no reversible error in this respect.

For the reasons above named the former opinion is withdrawn and the judgment affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9038.

DENVER & RIO GRANDE RAILROAD COMPANY v. SIMINOE.

RAILWAY COMPANY—*Duty to Fence Track—Yard Limits.* The yard limits of a railway station must be regarded as at least co-extensive with the sidetracks and switches existing and customarily used for the transaction of business at such station. Injury to an animal within such yard limits, no negligence of the railway employes being shown, affords no action.

Error to Mesa County Court, Hon. N. C. Miller, Judge.

Mr. E. N. CLARK, Messrs. GRIFFITH, WATSON & SMITH,
Mr. G. A. LUXFORD, for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

THIS action was commenced in a justice of the peace court of Mesa County by Siminoe, as plaintiff, against the Denver & Rio Grande Railroad Company, to recover damages for the value of plaintiff's cow, which was killed by one of defendant's trains. On appeal to the County Court, the verdict and judgment were for plaintiff, and the company brings the case here on error.

Defendant maintains the ordinary station buildings, grounds and yards at Whitewater, Colorado, which is an unincorporated town or village of about 100 inhabitants. The railroad, coming from the south from Denver, turns on a sharp curve to the west as it passes through town. At the time of the occurrence, the freight train which killed the cow passed through town from the south without stopping. On account of the curve, the engineer was unable to see the track ahead for more than about 200 feet. The

head brakeman, riding on the fireman's side of the cab at the time, saw a bunch of cattle near the track just as the train passed the depot building, and as they seemed about to turn to go upon the track, he yelled "cattle" to the engineer, who immediately blew his whistle and applied the emergency brakes, but was unable to stop the train before reaching the cattle, which had come upon the track, and were trying to go west over a cattle guard. Two of them, of which one was the property of plaintiff here involved, went through the cattle guard and were struck by the engine and killed. The right of way of the company at this point is unfenced on the south, where the cattle came upon the track, and the action is based on the stock killing statute of 1911.

Section 1, S. L. 1911, p. 400, provides inter alia:

"That every railway company or corporation whose lines or road, or any part thereof, is open for use, shall, within six months after the passage of this act, and every railway company or corporation formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railways or any part thereof are open, except at the crossings of public roads and highways, and within the limits of incorporated towns and cities, or the yard limits of established stations, erect and thereafter maintain fences on the sides of their said roads * * *."

It is the contention of the company that this case comes within one of the exceptions mentioned in the statute, to-wit, that the accident occurred within the yard limits of an established station, where the road was not required to be enclosed, and as no negligence or carelessness on the part of the company was established to show liability, notwithstanding the track was not required to be fenced, it is not responsible for damages occasioned by the killing of the animal in question. The testimony is without substantial conflict, and the position of the company seems to be clearly established by the evidence. The killing was in yard limits, which fact overcame the *prima facie* case of negligence, and

there was no evidence of negligence notwithstanding. As to the yard limits of the company at this station, the undisputed testimony shows that there is a side or passing track some 3,000 feet in length which parallels the main track at the station, where the accident occurred. This side track extends several hundred feet west of the point where the cattle were killed and to the east and south quite a distance beyond the station house, and is equipped with the usual switch stands. The testimony shows that this side track is necessary for handling the trains and business of the company at Whitewater, and is often inadequate for that purpose; therefore, the station yards or grounds must be considered to be of sufficient extent to include within its limits this sidetrack and switch stands. *Denver Co. v. Bird*, 60 Colo. 259, 152 Pac. 911.

As the cattle, including the animals killed, were within the yard limits when first discovered, and the point at which the accident occurred is also embraced therein, and it further appearing that no negligence on the part of the company or its employes was established, notwithstanding, as required by the act, the judgment is reversed and the cause remanded with directions to the lower court to dismiss the action.

Reversed and remanded.

Chief Justice Hill and Mr. Justice Scott concur.

No. 9053.

PAYNE v. THE PEOPLE.

ADMINISTRATOR'S SALE—Effect. An administrator's deed or bill of sale conveys only the title of his decedent. The maxim *caveat emptor* applies. In the absence of any special agreement as to the title, the purchaser must examine for himself.

One having a better title is at liberty to assert it in the courts, and in so doing is guilty of no contempt of the court which ordered the sale.

Error to Prowers County Court, Hon. C. B. Thoman, Judge.

Mr. W. B. GORDON and Messrs. GORDON & GORDON, for plaintiff in error.

Mr. J. C. HORN, for The People.

Mr. Justice Scott delivered the opinion of the court.

THIS action purports to be a proceeding in contempt against the plaintiff in error. R. B. Ray was the administrator of the estate of M. C. Turpin, deceased. After appraisal of the personal property and upon petition of the administrator the property was ordered to be and was sold.

This property so sold included a grain drill which was sold and delivered under said order to Roy C. Turpin. There is no question as to the regularity of these proceedings. Subsequent to the sale, the plaintiff in error instituted an action in replevin before a justice of the peace for the recovery of the drill. Judgment was rendered in his favor. Afterward the administrator upon petition and affidavit caused the plaintiff in error to be cited before the County Court upon a charge of contempt, the basis of the charge being the bringing of the action in replevin for recovery of the drill.

The cause was tried to a jury, who rendered a verdict finding the defendant guilty of contempt as charged in the complaint. The court thereupon entered the following remarkable judgment:

"It is hereby ordered, adjudged and decreed that J. A. Payne be and he is hereby held in contempt of this court; that no fine therefor, however, be imposed upon him, but he is hereby ordered to return said drill to the party from whom the same was unlawfully taken by said writ of replevin, and that he be held for the payment of all costs incurred by reason of said replevin and that execution issue therefor."

The defendant prior to the trial filed his motion to quash the citation upon the grounds that the court was without jurisdiction in the premises, and that the complaint and

affidavit were not sufficient in law to constitute a contempt of court.

Upon the face of the complaint it appears that the property had been sold and disposed of by order of the court, and that such property was not therefore at the time of the commencement of the action in replevin in the custody of the law.

It appears that the deceased Turpin had, prior to his death, purchased the drill from the plaintiff in error, giving a conditional sale or mortgage note, no part of which had been paid.

The only effect of an administrator's deed or bill of sale is to convey to the purchaser the title of the deceased. It can not contain any warranty of title. The notice was of probate sale. The rule of *caveat emptor* applies to such sales, and therefore, in the absence of any special agreement as to the title of the property sold, it is incumbent on the vendee to examine the title for himself.

The plaintiff in error under the state of facts presented had the right to try his claim of title in any court of competent jurisdiction.

There does not appear to be in this case any attempt to violate any rule or order of the court, nor does there appear any disobedience of its process. The motion to quash should have been sustained.

The judgment is reversed with instruction to dismiss the proceeding.

Hill, C. J., and Garrigues, J., concur.

No. 9005.

ULLMAN v. KELLEY.

1. **LIMITATIONS**—*Bill to Declare a Trust in a Decreed Appropriation of Water*, is not affected by the provisions of secs. 3313, 3318 of The Revised Statutes.
2. **WATER RIGHT**—*Equity in*. An appropriator who has conveyed an interest in his water right to another, induces his grantee to

rely upon his promise to protect him in adjudication proceedings, and secure a decree establishing his right. Equity will declare a trust in the water right, to the extent of the interest so conveyed, as against a purchaser from such original appropriator, taking with notice.

3. STATUTE OF FRAUDS—*Part Performance*. In such case the oral agreement is validated by the part performance.

Error to Eagle District Court, Hon. Chas. Cavender, Judge.

Mr. JAMES DILTZ, Mr. GEORGE C. MANLEY, Mr. PAUL KNOWLES, for plaintiff in error.

Messrs. HOGAN & BONNER, Mr. BERYL M. BONNER, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was brought to have plaintiff in error, William B. Ullman, defendant below, declared trustee of the legal title to a certain water right, under appropriation No. 68, in Water District No. 52, to the extent of one-half interest, for the use and benefit of plaintiff below, Roswell C. Kelley, defendant in error. The cause was tried to the court, with findings for Kelley on all issues, followed by judgment and decree in his favor. Defendant brings the cause here for review on error.

The essential facts are that one Conger owned two tracts of land, each of which was irrigated by him with the water right now in controversy. He sold one tract to plaintiff and another party; the latter thereafter conveyed his interest to plaintiff. Later Conger sold the other tract of land to the grantors of defendant, two brothers named Howard. The conveyance to the Howards also included one-half of the water right, under which he claimed, with a provision that the water should be used on the two tracts, by applying it alternately to the respective parcels. In the conveyance to plaintiff, which was subsequent to the Howard conveyance, Conger conveyed all of his right to the use of the water under priority No. 68, which he then had left.

In July, 1906, a general adjudication of water rights and

priorities was had in District No. 52, by which the Howards, grantors of defendant, were decreed to be the sole owners of priority No. 68. Defendant afterward purchased the Howard tract of land, together with their water right. Approximately three years later he attempted to enforce his claim under the decree for the exclusive use of such priority.

It is claimed by plaintiff, and there is testimony to support the claim, that the Howards, grantors of defendant, induced plaintiff to rely upon promises made by them that at the adjudication they would represent him, and obtain a decree which would establish in him the right to one-half of the water under Appropriation No. 68, in accordance with their respective deeds from Conger, but that instead they secured a decree for all the water in themselves; that neither the Howards nor their grantee, the defendant, ever attempted to enforce a claim to all the water until about three years after such decree was rendered; that plaintiff had always, under claim of right, used one-half of the water carried by priority No. 68; that defendant and his grantors knew of such use and of such claim; that defendant was aware of such claim, and of the use under it, before he purchased the land and water right from the Howards; that at the time of the adjudication the Howards were tenants in common with plaintiff in the use of the water, and that as matter of law the title acquired by them innured to the benefit of all, according to their respective interests.

The controlling questions of fact were in dispute between the parties. Defendant relies upon the two and four-year statute of limitation in relation to water decrees, and denies that there can be a tenancy in common in a water priority. The question of the statute of limitation may be disposed of at once by pointing out that this suit is in no sense an attack upon the decree, but merely seeks to have a trust declared in the priority awarded under it. Neither is the question of the existence of a tenancy in common necessarily involved. Plaintiff alleges matters which, if true,

clearly entitle him to have a trust declared as prayed. There was abundant competent testimony, much of which was uncontroverted, upon which to base the conclusions of fact in his favor. The court having so found, upon sufficient evidence, we can not, in the absence of prejudicial error affecting legal rights, reverse the judgment.

It is claimed by defendant that, even if the agreement so alleged was in fact entered into by the grantors of defendant, still it was an oral agreement only, and comes within the statute of frauds, and is therefore void. In this case, however, it appears that the oral agreement was validated by part performance, thus taking it out of the statute. As was said in *Park v. Park*, 45 Colo. 347, at page 356, 101 Pac. 403, 406:

"Oral agreements concerning priorities and title to water rights followed by its change of possession and application by the claimant have hitherto been held valid by this court, also that part performance will take it out of the statute of frauds and equity will enforce the right thus acquired. *Schilling et al. v. Rominger*, 4 Colo. 104; *McLure v Koen*, 25 Colo. 284, 53 Pac. 1058."

The findings of the trial court are supported by the evidence and there appears to be no error of law in the record, the judgment should therefore be affirmed and it is so ordered.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9004.

RENO v. RENO & JUCHEM DITCH COMPANY ET AL.

1. APPEAL AND ERROR.—*Findings Supported by Sufficient Testimony.* will not be disturbed.
2. PARTIES—*Bringing in New Parties.* Bill to establish title to an interest in water, for the irrigation of lands. Judgment for defendant upon a finding that plaintiff had disposed of his interest. Plaintiff applying for a new trial, also asked leave

to bring in as new parties defendant, the stockholders, defendant corporations, which he alleged he had not been able to ascertain, until they were disclosed by the secretary of the company. But the answer alleged that the stockholders of defendant were entitled to use and enjoy the waters claimed by plaintiff, and plaintiff did not then ask to be furnished the list of these stockholders, nor even ask that they be made parties, when later, during the hearing, their names were disclosed. Held that plaintiff having elected to try the action without bringing in the stockholders, was not entitled to complain of their absence, even if they were proper or necessary parties—as to which no opinion was expressed.

Error to Jefferson District Court, Hon. H. S. Class, Judge.

Messrs. JOHNSON & JOHNSON, for plaintiff in error.

Mr. J. W. BARNES, for defendant in error, The Consolidated Juchem Ditch & Reservoir Company.

Chief Justice Hill delivered the opinion of the court:

THE parties differ as to what kind of an action this is. It was brought by the plaintiff in error, hereafter called the plaintiff. He claims it is for the purpose of quieting his title to a water right. The defendants claim otherwise, and contend that the complaint is insufficient for that purpose, in that it fails to allege possession in plaintiff, and other matters necessary to be alleged in such an action. The defendants' theory is that it is a suit in equity calling for injunctive relief, etc., and damages for having denied plaintiff certain alleged rights.

The complaint alleges that about 1870 the plaintiff and two others acquired a right of way for, and constructed, a ditch (naming it) for the purpose of irrigating their lands; that it was mutually agreed that each should be entitled to the use of the ditch for this purpose; that about 1870 plaintiff diverted from Clear Creek through said ditch and applied to a beneficial use, etc., 1.58 cubic feet of water per second of time, on certain lands, describing them; that he was accustomed to thus so do without waiver or abandonment until 1889; that he has not sold, conveyed or aban-

done said right; that by reason of his diversion and use of said water as aforesaid, he became and is the owner of the right to take from said creek said amount, during each irrigation season, with date of priority of 1870, and became and is the owner of the right to carry said water through said ditch; that per adjudication in 1884, said ditch was awarded 6.31 cubic feet of water per second of time, as of date 1870; that this includes the rights of plaintiff; that since its construction said ditch has accumulated about five second feet of waste and seepage water, of which from 1870 to 1889 plaintiff was accustomed to take and use 1.25 cubic feet per second of time for the irrigation of his crops; that by reason of such diversion and use he became and is the owner thereof, with the right to carry same through said ditch; that during the irrigation season of 1905, plaintiff was in possession of certain lands (describing them), and took said water from said ditch and applied the same to the irrigation of said lands, but that defendants refused to allow him to use said water or any part thereof by reason of which plaintiff was prevented from using said water during said season of 1905, and since, to his damage in the sum of \$500.00; that defendants wrongfully assert some right or claim to the use of said water, and the right to carry the same through said ditch, when in fact defendants have no right, title or interest in or to the same; that the defendants have wrongfully carried and threaten to divert and carry said water, which belongs to plaintiff, where the same can not be used by him, and has prevented and threatens to continue to prevent and hinder plaintiff in the use and enjoyment of his said water rights, and the rights to the use of said ditch. The prayer is that plaintiff be adjudged the owner of both the direct and seepage water as aforesaid, and the right to carry the same through said ditch, and that the defendants be restrained from asserting any claim to said use of water or right to carry the same and from diverting and carrying the same beyond the control of plaintiff and for general relief.

The answer admits the partial construction of the original ditch by the parties as alleged and such ownership from 1870 to 1872, but denies such ownership since then; alleges that in 1872 the parties named in the complaint, as the original owners of the ditch, incorporated the defendant, The Reno & Juchem Ditch Company; that by reason thereof, the declarations contained in its certificate of incorporation, their subsequent conduct, etc., that the ownership and title to all the rights of said incorporators in said ditch, as aforesaid, became vested in said corporation; that, in August, 1892, its existence was extended for another twenty years; that ever since its organization, until the organization of the other answering defendant company, The Consolidated Juchem Ditch & Reservoir Company, in 1908, when it conveyed its property to this latter company, that it was in the exclusive possession and control of said ditch and the maintenance and operation thereof and in the carrying and distributing of the water flowing therein to its stockholders; that soon after its organization all of its capital stock (being sixteen shares) was issued and by mutual agreement and by a custom of the company, acquiesced in by all of the stockholders; that the appropriators of water lawfully flowing in said ditch, became and were represented by said stock, and said water distributed among the stockholders in proportion to the amount of stock held by each; that plaintiff served as secretary during the first few years, and as such issued stock and certified that all the capital stock of said company was fully paid. The answer plead the decree issued to it; alleged that plaintiff disposed of his stock and interest in said ditch, and all his rights to the use of water therefrom, on or prior to March 29, 1877, and certified as secretary on said date; that the entire sixteen shares of capital stock of said company had been issued; that said capital stock was fully paid, giving the names of the owners thereof on said date; that all subsequent stockholders derived their shares through these parties and that after March 29, 1877, until 1887, the plain-

tiff had no interest as stockholder or otherwise, and claimed no interest; that in 1887 he again acquired an interest, and afterwards disposed of it; that from 1877 to the present time he paid none of the expenses of the maintenance or operation of the ditch and has taken no water therefrom except wrongfully and surreptitiously and made no claim to ownership until 1905. The defendants admitted the contention of 1905, and plead the suit of *Reno v. The Reno and Juchem Ditch Company*, 51 Colo. 588, as *res judicata* of this action; alleged ownership to all their priorities in the stockholders of the defendant company, The Consolidated & Juchem Ditch and Reservoir Company, and that it has no surplus water. After pleading other affirmative defenses, they conclude with an allegation of open and notorious possession and use for the parties entitled thereto as aforesaid, under claim of ownership by them for over twenty years and deny all other allegations in the complaint. The replication denies certain portions of the answer and admits others.

The foregoing synopsis of the pleadings disclose that the action involves more than one to simply quiet title to a water right. It includes an alleged interest in the ditch for the future carriage of the water, and the right to the use of certain seepage and waste waters, which have since accrued in and become appurtenant to the ditch by virtue of its construction and operation. To some extent it includes questions involved in both kinds of actions.

The exact nature of the action is unnecessary to determine, as is the sufficiency of the defendant's plea of *res judicata*. Trial was to the court. Both sides were given unlimited latitude in submitting testimony pertaining to the history of the construction of the original ditch, the extension ditch, the consolidation of the two, by whom each was constructed and used, the several transfers, by whom and how made, likewise all matters pertaining to the appropriation of waters therefor, adjudications, etc., and all other matters pertaining to the ownership of all. In such

circumstances, the order of proof became immaterial. The findings were in favor of the defendants ditch companies. In passing upon them, the court said:

"In my judgment the plaintiff has failed to establish any right or title to the water in controversy * * * It appears and has been established to my satisfaction that the water right, or interest he had, was disposed of by him to others, and I think that there must have been an intendment to convey the water rights as well as the rights in the ditch. There are other matters, small matters, the demeanor of the witnesses on the stand, that led me to believe the defendant's side of this controversy; the weight of the evidence is with the defendants. * * * So far as abandonment is concerned, I think it is only necessary to pass upon that in connection with the conduct of the plaintiff on the theory that he sold and disposed of his stock."

It would accomplish no useful purpose to set forth and comment upon the testimony in detail. Counsel for plaintiff admits, as the evidence shows, that he disposed of his interest in the ditch many years ago, but contend that he did not sell his water rights. This contention is, in part, inconsistent with his claim set forth in his pleadings that he had the right to have his alleged water rights carried through this ditch and that he became the owner of certain seepage waters that came into the ditch by virtue of its construction and operation; but eliminating this, there is ample testimony to sustain the court's conclusion that he disposed of his water rights or interest in and to any water acquired by virtue of his original interest in and use of the ditch at the time that he disposed of his interest in the ditch. Such being the case, it is not the province of this court to disturb the finding.

Colo. P. Tel. Co. v. Colorado Springs, 61 Colo. 560, 158 Pac. 816; *Slack v. Anderson*, 60 Colo., 466, 154 Pac. 89; *Rogers, et al v. Nevada Canal Co.*, 60 Colo. 59; 151 Pac. 923; *Central Trust Co. v. Culver*, 58 Colo. 334, 145 Pac. 684.

In presenting the history of these ditches, it was disclosed that while the plaintiff and two others had originally commenced the construction of the original ditch, and turned it over to the corporation formed by them, viz., the defendant, The Reno and Juchem Ditch Company, with a capital stock of sixteen shares, all of which, in March, 1877, were owned by three persons; that later what is called the extension ditch was constructed by The Juchem Extension Ditch and Reservoir Company; that this ditch was an extension of the original ditch; that thereafter, the interests of both were merged and transferred to a new corporation known as The Consolidated Juchem Ditch and Reservoir Company, one of the defendants herein; that the right to the use of water in the entire system was then evidenced by the stock of this latter company, which, at the time of trial, was owned by some seventy persons. In his motion for a new trial, the plaintiff asked permission to bring in as new party defendants all of those who use or claim to use the water and water rights in question, in order, as he alleges, that all parties in interest might have their day in court. He claims that this was justifiable when the evidence disclosed who they were. Error is assigned to the overruling of this request. It is urged that the main object of this action was to establish ownership in a water right to quiet title thereto and to require The Reno and Juchem Ditch Company to set up any right it had in it; that as the defendants did not claim to own the water, and did not assume to represent any one who did, and because at the time the plaintiff commenced this action he did not know who claimed any interest in his water, outside of The Reno and Juchem Ditch Company, and because this defendant did not, in its answer, enlighten him as to who was claiming it; that he was not able to secure this information until the witness Cole, secretary of the Consolidated Company, furnished him with a list of its so-called stockholders to the number of seventy; that for these reasons, when they were ascertained that it was his right to have

them brought in and have his title quieted against all parties claiming any interest therein. One answer to this contention is plaintiff's erroneous position concerning it. His assumption that the defendants did not assume to represent any one who claimed to own this water is not correct; but to the contrary the pleadings disclose that The Consolidated Company was the owner of the ditch, and that the persons entitled to the use of the priorities awarded to its predecessors in interest were its stockholders and consumers thereunder. After this answer was filed, the plaintiff did not see fit to ask to be furnished a list of their names, or that they be made parties to the action. Neither did he do so when the list was furnished during the taking of testimony, but raises the question for the first time in his motion for a new trial. In their answer, the defendants alleged that all the waters to which said ditch was entitled had been appropriated by others than the plaintiff, for the irrigation of their lands, etc.; that such consumers have and claim a right thereto, etc., and that it has been diverted and delivered to them, etc.; that by reason thereof, said consumers are necessary and proper parties to this action. In reply to this allegation, the plaintiff states that as to whether all of the waters entitled to flow in said ditch have been appropriated by a large number of farmers, etc., under said ditch, plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief, and alleges that if such is the case that their rights are subsequent to and subject to the rights of plaintiff; denies that said appropriators are necessary parties to this action. This replication was filed five months after the answer of the defendants was filed. Thereafter, plaintiff went to trial without asking that these appropriators be brought in, and during the trial when informed by testimony who they were, he did not then ask that they be brought in, but presented it for the first time in his motion for a new trial. He evidently was satisfied, until after the case was decided against him, that for the purposes of the

issues made, it was competent for the ditch companies to represent and act as the agent of its stockholders in the determination of the question between them and him as to who was the owner of the water rights in question. In such circumstances, he cannot now be heard to complain because they were not brought in, for which reason it is unnecessary to determine whether they would be necessary or proper parties in an action of this kind. In this jurisdiction the rule in water cases is that where a case is, by consent of a party, tried upon a certain theory that he will not thereafter be heard to complain that it was not the correct one.

Johnson, et al. v. Sterling Irr. Co., 49 Colo. 482, 113 Pac. 496; *Weldon Valley Ditch Co. v. Farmers Pawnee Canal Co.*, 51 Colo. 545, 119 Pac. 1056.

Perceiving no prejudicial error, the judgment will be affirmed.

Affirmed.

Mr. Justice Garrigues and Mr. Justice Scott concur.

No. 8937.

BUNDY, ET AL. v. WISCAMB.

CONTRIBUTORY NEGLIGENCE—*For Jury.* Action by servant against master for an injury attributed to negligence. Defense contributory negligence. The evidence being such that different minds might honestly draw different conclusions, *held* the question was for the jury and that defendant's motion for a directed verdict was properly denied.

Error to the Denver District Court, Hon. Jesse C. Wiley, Judge.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. GEORGE O. MARRS, for plaintiffs in error.

Mr. G. K. ANDRUS, Mr. RALPH R. ANDRUS, for defendant in error.

Opinion by Mr. Justice Allen.

This is an action brought by Ike Wiscamb, plaintiff be-

low, against E. E. Bundy and others, defendants below, to recover damages for personal injuries sustained by the plaintiff while in the employ of the above mentioned defendants, who operated a coal and wood yard under the name of The Bundy Coal Company.

The complaint charges the defendants with certain negligence, on which plaintiff's right to recover is based. The answer of the defendants includes a plea of contributory negligence on the part of the plaintiff. The jury found the issues in favor of the plaintiff. Judgment was rendered accordingly, and defendants bring error.

The first and main contention of the plaintiffs in error is that the plaintiff below was guilty of contributory negligence, as a matter of law, and that a verdict should have been directed in favor of the defendants.

More or less relevant to the question of plaintiff's alleged contributory negligence, there was testimony to the following effect: On March 6th and 7th, 1915, one Edwards was engaged in sawing logs for the defendants, using a circular saw. The sawing machine was located at the side of a roadway which passed over the platform of the scales at the defendants' office. The platform scales were about 18 feet away from the saw. On the evening of March 6th, the plaintiff was directed by his employers, the defendants, to come to the yard the next morning and "go to work on the logs." The plaintiff in compliance with the order, appeared at the yard on the morning of March 7th, and "started off-bearing," that is, catching the sawed-off blocks and throwing them across the road. While plaintiff was thus at work, a team and loaded wagon, used in the coal business of the defendants, and in charge of one of their employees, came upon the platform of the scales, and soon thereafter, in leaving, passed on the roadway beside the saw machine. The plaintiff claims that when the team and wagon passed him at the saw, the wagon or wagon box

rocked and swung toward him, and by doing so, knocked him upon the saw, severely injuring him. No witness, other than the plaintiff, observed, or testified concerning, the manner in which the accident happened.

Prior to the accident, the plaintiff saw that the coal wagon in question had arrived upon the scales, and knew that the team and wagon would soon pass over the roadway, beside the saw machine. According to the plaintiff's testimony, he did not see the team start from or leave the scales, and after the team had started, the plaintiff had neither the time nor the opportunity to look for, or to take a position of safety, in any other manner than that in which he did attempt to do so.

The plaintiff testified that he did not see the wagon, after it left the scales, until the horses had passed him; that he then threw his arm up in an effort to grasp a brace upon the saw machine, and that if he had grasped it he would have been safe, but that he was struck by the wagon before he could reach the brace with his hand. It is plain from the evidence that the plaintiff could have avoided danger if, before the team arrived near the saw machine, he had stepped around the saw, and taken a position from two and a half to three feet from where he was standing, while doing his work. The plaintiffs' testimony, however, meets this fact by his statement to the effect that it was too late to seek this position after he found that the team had left the scales, and that had he attempted to do so he would have been knocked against the saw blade.

The scales being 18 feet from the saw machine, while the wagon was standing upon the platform of the scales the heads of the horses were probably about ten feet from where the plaintiff stood. Necessarily then, a very short time would elapse before the team would pass him after starting from the scales. During all of the time from the moment plaintiff first noticed the wagon at the scales, until the accident occurred, the saw machine was in operation, and logs were being sawed. Plaintiff's attention was con-

sequently directed to his work, and to the sawing operations. The evidence also shows that prior to the day of the accident the plaintiff had not worked at or with the saw machine, and that after having begun his work as off-bearer of the sawed blocks, the first and only time that a team came down or upon the roadway and by the saw was upon the occasion in question, when the accident occurred.

We cannot say that, from the undisputed facts in this case, reasonably intelligent men can fairly draw no other conclusion therefrom than that the plaintiff was guilty of contributory negligence. We are of the opinion that the evidence discloses a state of facts from which different minds may honestly draw different conclusions on the issue of contributory negligence. Under these circumstances the question was a matter for the jury to determine, and the trial court properly denied defendants' motion for a directed verdict based on the ground that the plaintiff was guilty of contributory negligence as a matter of law. *Catlett v. Colo. & So. Ry. Co.*, 56 Colo. 463, 471, 139 Pac. 14; *Phillips v. Denver Co.*, 53 Colo. 460, 128 Pac. 460; Ann. Cas. 1914 B 29; *Monarch M. & D. Co. v. De Voe*, 36 Colo. 270, 276, 85 Pac. 633; 29 Cyc. 631.

Other matters are discussed in the briefs, but none of them show reversible error.

The judgment is affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 8811.

PEARCE v. MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.

1. APPEAL AND ERROR—*Record—Indefinite and Unintelligible Testimony, Censured.* Action for negligence in the installation and conduct of electric fixtures. Witnesses were permitted to refer to a diagram drawn upon a blackboard, and to testify that

"from here to there," etc., without any identification of the points referred to. The court complained of the unnecessary labor cast upon it by this crude and shiftless manner of conducting matters in the court below.

2. *Presumptions.* The plaintiff having been non-suited, the court of review, on error brought, assumes the truth of the evidence produced on his behalf.
3. *EVIDENCE—Presumptions.* A corporation operating appliances for the conduct and employment of electricity is presumed to have special knowledge and skill, which it is its duty to exercise for the protection of its patrons.
4. *ELECTRICITY—Duty of Those Conducting and Using.* A telephone company is bound to know that its wires may become charged with a dangerous current, induced by lightning, and it is under a duty to use reasonable care to guard against possible fire, resulting from such excessive current.

If after the installation of its instruments in a patrons' premises, a change in the condition of such premises occurs, and such change is known to the company, or might be known by the exercise of reasonable diligence, it is under duty to use reasonable care to effect any improvement in its appliances, necessary to the safety of the premises from any danger occasioned by the change.

5. *ACT OF GOD—Negligence.* A telephone company which fails to exercise reasonable care to protect its patrons from injury by an excessive current upon its wires, induced by lightning, will not be heard to excuse its neglect as resulting from the act of God.
6. *TRIAL—Questions for the Jury.* Action against a telephone company for the destruction of a patron's property, attributed to negligence in the installation of its system in the patron's premises. Whether defendant was guilty of negligence in not adopting the most approved method of construction and maintenance, and whether such negligence was an efficient cause of the injury, are questions for the jury.

So whether the company knew, or by reasonable diligence would have known, of a change in conditions in the premises, and had reasonable time to effect any improvements or addition, made necessary by reason of such change.

Error to Jefferson District Court, Hon. H. S. Class, Judge.

Messrs. MCCALL & MCCALL, for plaintiff in error.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. WILLIAM H. FERGUSON, Mr. ELMER L. BROCK, Mr. FLOYD F. WALPOLE, for defendant in error.

Garrigues, J.

This action is to recover damages occasioned by fire, alleged to have been caused by the negligent installation and maintenance of a telephone and appliances in plaintiff's store building. The point involved relates to the alleged error of the court in sustaining defendant's motion for a nonsuit at the close of plaintiff's evidence.

The complaint alleges that plaintiff's building and stock of merchandise burned May 13, 1913; that at that time and long prior thereto, defendant owned, operated, managed and controlled a telephone line, extending from its exchange at Arvada, into plaintiff's building, where it installed, owned, controlled and operated a telephone instrument, and maintained a public pay station at Leyden Junction; that the fire was caused by atmospheric electricity, induced by lightning conducted over the telephone wires into the building; that the company was negligent in installing, equipping, operating and maintaining the telephone and appliances in the building, and in failing to install and use well known and approved appliances and equipment, to protect the building from excess currents of electricity induced by lightning.

At the close of plaintiff's evidence, defendant introduced a motion for a nonsuit upon the ground that plaintiff had failed to sustain the allegations of the complaint, and had not established any negligence on the part of defendant; that he had failed to connect the destruction of the building with any act of negligence, or omission of defendant, and that the testimony disclosed the fire was the result of an act of God.

The court sustained the motion, took the case from the jury and entered a judgment of nonsuit. Plaintiff brings the case here on error.

The evidence shows that a well known and approved protector or lightning arrester was installed, and in use in the building, and this point will not be further considered. The

other acts of negligence relate to faulty installation, equipment and maintenance.

The witnesses used a blackboard for illustration, and in describing the situation would say, "From here to there," or, "From this point to that point," etc., which has thrown upon us a great amount of labor in comprehending the testimony. If counsel had used a diagram for purposes of illustration and made it a part of the record for our use here, it would have saved us a great amount of trouble in understanding the evidence.

We have read and studied not only the abstract, but the entire bill of exceptions, with unusual care. There is evidence showing the public highway or road at Leyden Junction, where the fire occurred, runs north and south; that originally there was a farm house facing east, which stood a few feet from the road; that there was installed in this residence in 1904, a telephone, the line of which came from the south, passing the house in the public highway, and going north; about 100 feet from the house, and a little to the south, there was a telephone pole; that the telephone wires serving the phone, came from the Arvada exchange, and ended at this pole; that about two feet above these wires there was another set of wires going on to the north; that the drop wires extended from the pole in the road, to the south side of the building, at which point they were connected with the service wires which entered the residence, and here was a ground wire. In 1896 a store room was built onto the rear or west end of the residence, where plaintiff conducted a country store, at the time of the fire, and in 1908, the phone instrument was moved by defendant from the residence, and installed in the rear or west end of the store building. In making this change, the drop wires were carried from the pole to the southwest corner of the store building, at a point under the eaves, where were placed two porcelain knobs, from which point two service wires extended down the west side or end of the store building, on the outside, to a point about 8 feet

above the ground, and 8 or 9 feet from the south side of the building, where there were two porcelain knobs. The west wall, being the back end of the store, was composed of drop siding, and here a hole was bored or cut into the store building, through which the service wires were passed and connected with an arrester, which was attached to the west wall on the inside, immediately over the phone instrument. From the arrester, a ground wire of the same size as the service wire, extended through the hole in the wall up to the connection under the eaves, at the southwest corner of the store, where it was attached to the old ground wire in use when the phone was in the residence. These three wires, that is, the two service wires and the ground wire, were passed through the same hole in the west wall, twisted together, and tacked to the wall without insulation. They were all of the same size, smaller than the drop wires and none of them were incased in nonconducting tubes. The ground wire, instead of taking the shortest course to the ground, passed through the hole in the wall, thence along the outside of the building to the point where the service wires were connected with the drop wires, and there hooked up with the old ground wire. After this, and sometimes prior to 1913, exactly when the evidence does not disclose, plaintiff built a butcher shop onto the west end of the store room, which changed the west or rear wall along which the wires were tacked, from an outside, to a partition wall between the butcher shop and store, so that the phone and arrester were no longer on an outside wall. The evidence does not show that during the building of the butcher shop, or afterwards, that any change whatever was made in the location of the phone, arrester, or any of the appliances. The shop was simply built onto the back end of the store, and the installation was left as it was. The three wires now passed through a hole under the eaves at the southwest corner of the store building. Who made the hole, or put the wires through, the evidence does not disclose, but it was explained in oral argument here, that the workmen

simply built around the wires and left them as they were.

On the night of May 13, 1913, about 11:30, a thunder storm passed over the locality which was no unusual occurrence, and not of extraordinary severity. During this storm a flash of lightning either struck the wires going north, immediately above the phone wires at the pole, or came to the ground in the immediate vicinity, or both. About a quarter of an hour later, plaintiff discovered the butcher shop was on fire where the wires were tacked against the wooden wall, and at the hole under the eaves where they entered the building.

Plaintiff claims the phone was negligently installed in the store in 1908, and so remained until the fire; that the service and ground wires where they passed through and were tacked against the wall, should have been incased in non-conducting tubes; that the ground wire was too small and should have been as large as the two service wires combined in order to carry away any current they brought in, and should have taken the shortest course to the ground; that the arrester, after the building of the butcher shop, should have been moved to an outside wall; that the stroke of lightning induced an excessive current of electricity which was conveyed over the service wires into the house and set fire to the building.

The defense contends that the house was struck directly by lightning, and set on fire; that if the bolt struck the wires, and entered the house, it was of such force that no installation could have prevented the destruction; that if an excess current on the wires was induced by lightning, it was an act of God for which defendant was not responsible; that the phone was properly installed in 1908, without negligence; that plaintiff changed the conditions by building the butcher shop, for which defendant was not responsible, and that it had no knowledge of the changed conditions.

It must not be understood that we find any fact has been established or settled. A nonsuit having been sustained, at the close of plaintiff's evidence, we simply assume, for the purpose of the review, that plaintiff's evidence is true.

Garrigues, J., (after stating the case as above).

1. There was evidence that an excess current of electricity, induced by lightning, was conveyed over the telephone wires into plaintiff's building, setting it on fire. Defendant was bound to know that its wires might become charged with a dangerous current induced by lightning, which made it the duty of the company to use reasonable precaution to guard against fire. Because such excess current was produced by lightning makes no difference in defendant's liability, if it could have avoided the injury by exercising ordinary care and diligence. From the business in which defendant is engaged, it is presumed to possess special knowledge and skill in such matters, not possessed by laymen, which it was its duty to use for the protection of its patrons, no matter whether the current was generated by it or produced by lightning. It was as much its duty to be diligent in affording protection against a current likely to come over the wires not generated by it, as a current it generated, and it could not escape this responsibility by pleading that the excess current was induced by lightning. No one was responsible for the lightning; but if defendant's faulty installation or management of the phone and its appliances was responsible for the excess current coming over the wires, entering the building and doing the damage, or if by the use of ordinary and reasonable care, precaution and diligence, it could have avoided the injury, it is responsible.

If two efficient causes united in producing the injury and the company brought about one of them, it would be responsible. In other words, if lightning and defendant's negligence concurred as the efficient cause of the fire, defendant would be liable. For plaintiff to recover, the jury would only have to find that the negligence of defendant was an efficient cause, without which the injury would not have happened. We are therefore of the opinion it was defendant's duty to use such proper and ordinary care, in the installation and maintenance of the phone and appli-

ances as would afford protection against injury likely to occur from an excess current from any source, reasonably to be expected.

2. Applying the rules of law above announced, to the evidence showing: That the phone wires were charged with an excess current of electricity, induced by lightning conducted over the wires into the building, setting it on fire, that the wires where they passed through and were tacked against the wooden partition, should have been incased in non-conducting tubes; that the ground wire should have taken the shortest course to the ground, and was too small; that after the butcher shop was built, the arrester should have been removed from the inner wall to an outer one; that the excess current could have been safely conveyed to the earth, if proper appliances had been used; that there were in common use, well known, approved and efficient non-conductive tubes, electrical protective devices, and appliances, for safeguarding property from injury from lightning passing over telephone wires to buildings in which such wires enter, and that here, the installation was defective, improper and dangerous; the origin of the fire was a question that should have been submitted to the jury.

Whether defendant adopted the most approved method of construction and maintenance to guard against such a casualty, or whether it was guilty of negligence in this regard, or whether by reasonable precaution it could have prevented the injury, or whether its negligence was an efficient cause were questions of fact. It is no defense that an excess current induced by lightning came over the wires, if the negligence of defendant in not properly installing and maintaining the phone and appliances was an efficient cause of the injury, and without which it would not have happened. Whether or not defendant installed and maintained the phone with the usual and ordinary appliances for conducting an excess current likely to occur, caused by lightning, to the earth, and whether had it done so, no injury would have occurred, were questions of fact that should have been submitted to the jury.

3. As to the changed conditions caused by plaintiff building the butcher shop, if the company had no knowledge of the change, and it was the cause of the injury, defendant would not be liable. But if the building of the addition made the location of the arrester improper and dangerous, and defendant knew, or by the exercise of reasonable care would have known of the changed conditions, it was its duty to make a proper installation after the change. If it knew the location of the arrester had been so changed by the addition of the butcher shop, that the building was in danger of fire from an excess current, caused by lightning coming in over the wires, it was its duty to move the arrester to an outside wall, if that was necessary, no matter if plaintiff brought about the change. There was evidence from which the jury could have found that defendant knew of the changed conditions and had reasonable time within which to move the arrester. All of these matters, including the changed location of the arrester and whether defendant had knowledge thereof and had reasonable time within which to move it from an inside to an outer wall after the butcher shop was constructed, should have been submitted to the jury.

Judgment reversed and cause remanded.

Reversed and Remanded.

Chief Justice Hill and Mr. Justice Scott concur.

No. 8876.

INTERSTATE TRUST COMPANY v. STEELE, ET AL.

1. IRRIGATION DISTRICT—*Warrants Issued for a Lawful Claim not Verified.* Warrants of an irrigation district were issued for expenses incurred in the organization of the district, and confirmation proceedings, *Held* not invalidated by the circumstance that these claims were not verified.

In view of the broad provisions of sec. 3450 of the Revised Statutes, sec. 3463 is not to be held mandatory.

2. — *Promise of Third Party to Redeem.* Nor are such warrants invalidated by the circumstance that they are issued because

of, and upon the faith of the promise of a third person to redeem them.

3. — *Directors—Disabilities.* The directors may not employ one of their number as secretary, or superintendent, of the district. Warrants issued to a director for his salary in such position are void.
4. — *Bonds—Recitals of,* are not to be disputed.
5. — *Bona Fide Holder.* Warrants of an irrigation district issued in payment of an obligation for which the district was liable are valid in the hands of one who receives them in the usual course of business, without notice of any defect in the title.

Error to Adams District Court, Hon. Robert G. Strong, Judge.

Department.

Mr. J. FOSTER SYMES, Mr. FRED FARRAR, Mr. IVOR O. WENGREN, for plaintiff in error.

Mr. GEORGE J. HUMBERT, Mr. H. H. WHITTIER, Mr. H. L. SHATTUCK, Messrs. MELVILLE & MELVILLE, for defendants in error.

Opinion by Mr. Justice Teller.

Defendant in error Steele, suing as a tax-payer in behalf of himself and all others similarly situated, brought an action, against all the other persons and corporations appearing here as defendants in error, the plaintiff in error and Fred G. Lucas, to secure the cancellation of certain warrants and bonds issued by defendant in error, The East Denver Municipal Irrigation District; to have the organization of said district declared void and of no effect, and to restrain the levying of taxes for the payment of interest upon said bonds and warrants.

The trial court found that the Irrigation District was a valid organization; that in August, 1910, the district entered into a contract in writing with The Antero Land and Irrigation Company, for the purpose of acquiring a completed irrigation system; that the electors of said district duly ratified said contract, and the issue thereunder of

bonds in the amount of \$3,000,000.00; that all of said proceedings for the organization of the district and the issue of the bonds were confirmed in a proceeding in the District Court of Adams County; that said bonds were executed and delivered to the plaintiff in error, as trustee, under date of January 3rd, 1912; that on August 30, 1912, another contract was entered into between the said parties, which was duly ratified by the electors of said district; that both of said contracts were duly assigned by said Land and Irrigation Company to defendant Fred L. Lucas, and that thereafter the said district entered into a contract with him, which contract was never authorized nor ratified by the electors of said district.

Said Lucas was dismissed from the case by order of the District Court.

The court further found that the plaintiff in error, on the 4th day of February, 1914, as trustee, delivered to the board of directors of said district bonds of the par value of \$325,000.00; that said district delivered bonds to the par value of \$10,000.00 to the plaintiff in error, a like amount to defendant in error Lena R. Russell, and bonds to the par value of \$20,000.00 to defendant in error Horace G. Clark; and that bonds in a large amount were delivered to said Lucas, none of which are concerned in this case. The court also found that the \$10,000.00 in bonds delivered to the plaintiff in error, and bonds delivered to Lena R. Russell and to Horace G. Clark are valid obligations of said district, and that warrants Nos. 18, 29 and 205 were received by the plaintiff in error in the usual course of business for value, without notice of any defect in title, but void because procured to be issued to the said Land and Irrigation Company, the assignor of plaintiff in error, upon its promise to the directors of said district to redeem and pay the same. A number of other warrants, now held and owned by plaintiff in error, were adjudged void, because issued, as the court found, without authority.

Plaintiff in error has assigned error upon so much of the judgment of the court as holds said warrants void; and defendant in error Steele has assigned cross-errors upon so much of said judgment as holds the bonds valid. Counsel for the Irrigation District join in the brief in support of the cross-errors.

Plaintiff in error contends, first, that the court erred in holding warrants Nos. 18, 29 and 205 void, since, it is urged, the plaintiff did not sustain the burden of overcoming the *prima facie* case made by the warrants, which were admitted to have been purchased by the plaintiff in error for a valuable consideration, and to have been issued for services rendered to the district, and for expenses incurred in organizing it.

The court held the three warrants void because their issue was procured by a promise by the Antero Land and Irrigation Company to redeem them. The court pointed out that it was discretionary with the board whether or not to allow the claims and issue the warrants, and "that the moving of such discretion in favor of such audit, allowance and issue by such inducement was and is against public policy."

It is stipulated that these warrants, and some others, "were issued to the Antero Land and Irrigation Company for expense incurred by it in organizing said district and in the confirmation proceedings in connection therewith, including necessary engineering and surveying and attorney fees and court costs."

The warrants, then, must be regarded as issued in settlement of valid claims against the district, no one asserting that the expenses mentioned were not payable by the district, or that the amounts allowed were excessive.

This presents the question whether or not the allowance of a valid claim, and the issue of a warrant therefor, though induced by a cause other than a recognition of the debt, render the warrant void.

The finding of the court that to permit a public officer to allow claims on the ground that someone has promised to pay them is against public policy, may be admitted to be correct; but does public policy require that the innocent holder of a warrant thus issued, for a valid debt, be punished by having such warrant held void?

Bearing in mind the fact that no fraud or collusion is charged, and that the right to make the alleged agreement is not questioned, we are to determine whether or not the doing of a proper act from a wrong motive will render it invalid. To state the proposition is to answer it.

Conceding, then, that the evidence justifies the finding that the two directors who testified that they allowed the claims because of the promise, (the third director testified that he had no knowledge of such promise, and that the claims were considered by the board,) it does not follow, under the circumstances of this case, that the allowance was wrong, or that the warrants are void. The facts as stipulated show that the warrants were issued in payment of obligations for which the district was liable, and they are, we think, valid in the hands of plaintiff in error.

It is urged that the warrants are void for the further reason that the claims on which they were issued were not verified.

The statute on which counsel rely to maintain that position provides that:

"No claims shall be paid by the district treasurer until the same shall have been allowed by the board, and only upon warrants signed by the president, and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purpose. * * *

All claims against the district shall be verified the same as required in the case of claims filed against counties in this state, and the secretary of the district is hereby authorized and empowered to administer oaths to the parties verifying said claims, the same as the county clerk or notary public might do. * * * "Sec. 3463, R. S. 1908.

Section 3450, R. S. 1908, gives to the district board full power to conduct the business of the district, to make all necessary contracts, employ agents and attorneys, and to perform all acts necessary to carry out the purpose of the irrigation statute.

In view of the general powers thus given to the board, we think the requirement that claims be verified should not be held mandatory, unless the intent that it be so clearly appears. The first cited section does not include verification among the things *required* to be done before payment may be made. The verification requirement follows in another paragraph, in connection with other provisions relevant to the subject matter of the section. The omission to verify does not deprive the board of the power given it by Sec. 3450, *supra*. The failure to verify the claims is not jurisdictional. *State ex rel v. Cass County*, 60 Neb. 566, 83 N. W. 733; *Saline County v. Kinkead*, 84 Ark. 329, 105 S. W. 581; and *Wright v. Village of Portland*, 118 Mich. 23, 76 N. W. 141.

Warrants Nos. 4, 10, 16, 20, 34, 40 and 45 were issued to one of the directors of the district for his services as secretary of the district; and warrants Nos. 13, 23, 31, 39, 46, 58, 64, 70, 80, 99 and 112 were issued to another director for his services as superintendent of the district, and all of them were duly assigned to the plaintiff in error.

Said warrants, with some others, were held invalid, on the ground that the persons to whom they were issued had no right to receive compensation from the district for the services rendered.

We agree with the trial court that the board had no right to employ any of its members in the capacities above mentioned, and that the warrants issued in payment of salaries of said positions are void. Such a course is contrary to sound public policy, and has often been condemned. *Bay v. Davidson*, 133 Ia. 688, 111 N. W. 25, 9 L. R. A. (N. S.) 1014, 119 Am. St. 1650, and cases cited; *Dillon on Municipal Corp.*, 3rd Ed., Sec. 444.

We are of the opinion that the court did not err in holding valid the bonds issued to the plaintiff in error and to defendants in error Russell and Clark, respectively.

It is objected that these bonds were delivered by the board of directors, without the passage of any resolution therefor, and without having advertised them for sale.

The bond issue approved by the electors, and authorized by the proceedings in the District Court, was for the purpose of providing an irrigation system, including rights of way, reservoir sites, ditches and water rights; and it is not disputed that the three lots of bonds now under consideration were issued for one or another of those purposes.

The bonds contain the usual recital that all acts required to be done and all conditions required precedent to this issue had been done, etc., which fact prevents a consideration of the objection mentioned, which is based upon an allegation that some of the conditions precedent had not been performed. The power to issue the bonds is conceded. The municipality cannot dispute the recitals: *Hayden v. Aurora*, 57 Colo. 389; and one suing as a tax-payer has no greater right.

The bonds were received by the respective holders for value, and so far as appears, without any knowledge of irregularity in their issue.

The attack upon them, therefore, fails.

A stipulation has been filed in this court which is apparently intended to permit or induce us to pass upon other questions presented by the record, but as their determination would decide questions affecting bond holders who are not parties to this suit, we decline to consider any matters other than those above discussed and determined.

So much of the judgment as adjudges the \$10,000.00 in bonds delivered to defendant in error Russell, a like amount to The Interstate Trust Company and \$20,000.00 in said bonds to the defendant in error Clark is affirmed; as is also so much of it as holds void the warrants Nos. 4, 10, 16, 20, 34, 40, 45, 13, 23, 31, 39, 46, 58, 64, 70, 80, 99 and 112;

and so much of said judgment as makes invalid and orders the surrender and cancellation of warrants Nos. 18, 29 and 205 is reversed. The cause is remanded for further proceedings in harmony herewith.

Chief Justice Hill and Mr. Justice White concur.

No. 8860.

PETERSON v. THE PEOPLE.

1. CRIMINAL LAW—*Instructions—Assuming Matter in Issue.* Indictment for larceny of live stock. There was evidence that the accused had taken the animals in question into his possession and branded them. Being charged with their larceny he had afterwards before initiation of the prosecution, surrendered them to the one alleged to be the owner. An Instruction which told the jury that if they believed beyond a reasonable doubt that defendant had taken the animals, with intent to steal, etc., they should find him guilty though he "afterwards returned them to the owner." *Held* an assumption of ownership in another, and fatal error.
2. — *Reasonable Doubt.* The accused is entitled to an instruction that if the jury entertain a reasonable doubt as to whether on assuming possession of the chattels alleged to be stolen, and asserting title thereto, he acted in good faith, they should acquit.

*Error to Lincoln District Court, Hon. J. E. Little, Judge.
En banc.*

Mr. HENRY TROWBRIDGE, Mr. ROY E. DICKERSON, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. IRVING VAN BRADT, assistant, for The People.

Opinion by Mr. Justice Teller.

Plaintiff in error was convicted of stealing three calves the property of one Lee, and brings error.

The principal witness for the State was one Horwood, a young man who had been employed by the defendant on

his farm. This witness testified that, the defendant being away from home, he went out on the range and drove up the milk cows; that four young cattle followed along with the cows to the defendant's premises; that defendant came home after dark, and asked whose calves were out in the road; that witness replied that he did not know, and that defendant then told him to drive them in, and he did so; that the next morning defendant looked the calves over, and drove off one of them which was branded; that in the afternoon of that day he helped defendant brand the three calves, and two cows which had not been found on the day before, when a large number of defendant's cattle had been branded at a neighbor's place. Witness testified further that defendant subsequently admitted that the calves probably belonged to Lee, and that defendant kept them shut up, and in reply to inquiries by Lee as to calves for which he was looking made statements tending to keep Lee from finding the calves; that the witness, when quitting defendant's employment, accused him of stealing the calves, and made the same charge subsequently to others. Defendant and his wife testified that the calves were theirs; that they had raised them; that, when Horwood charged defendant with stealing the calves, defendant and his wife visited Lee, and told him of the charge, and asked him to come and see the calves to determine to whom they belonged. Lee having claimed them, defendant gave them up. Immediately thereafter he was arrested, and the trial followed in due course.

Error is assigned in the giving of instruction seven, which is as follows:

"7. You are instructed that if you find and believe from the evidence beyond a reasonable doubt that the said defendant, on the 18th day of April, 1915, at the said County of Lincoln, did then and there wilfully, unlawfully and feloniously of the personal goods and chattels of Richard Lee, three head of neat cattle steal, take and drive away with the intent then and there to steal the same and deprive the owner of the immediate possession thereof, then

you should find the defendant guilty as charged in the third count of the information, notwithstanding the fact that he afterwards returned the property in question to the owner; otherwise you should acquit him."

Objection is made to the latter portion of this instruction on the ground that it states as a fact that defendant "*returned* the property in question to the *owner*"; thus informing the jury that Lee was the owner. Since the defense was ownership by the defendant, the determination of that question was material, and it was error for the court to assume, as it did, ownership in Lee. The use of the words "*returned*" and "*owner*" would justify the jury in concluding that the court held Lee to be the owner.

It is further objected that the court refused to give tendered instructions that if the jury had "a reasonable doubt on the question of whether the defendant did or did not honestly consider these animals his own property when he took possession of them," it was their duty to acquit him.

This instruction should have been given.

Whether or not the claim of ownership was made in good faith was for the jury to determine, under proper instructions. *Miller v. People*, 4 Colo. 182, and, if the evidence was sufficient to raise a reasonable doubt in the minds of the jury whether or not defendant made such claim honestly, or thought the calves were his when he took them, he was entitled to be acquitted. *Van Straaten v. People*, 26 Colo. 184; 56 Pac. 905; *Johnson v. United States*, 2 Okla. Cr. 16, 99 Pac. 1022. Refused instructions two and three each stated the above rule of law and one or the other of them should have been given. The instructions given do not cover this point.

Because of these errors the judgment is reversed.

Judgment reversed.

Mr. Justice White and Mr. Justice Garrigues and Mr. Justice Bailey dissent.

Garrigues, J., dissenting.

I cannot concur with my brothers in the reversal of this case. I assume the people's evidence to be true, which supports the conviction. It overwhelmingly shows the defendant's guilt, and I see no prejudicial error in the instructions.

The court told the jury: Defendant is presumed to be innocent of the crime charged, which presumption abides with him throughout the trial and the burden is upon the people to establish his guilt from the evidence beyond a reasonable doubt; that when one takes possession of the property of another on good faith, honestly believing that the property taken belongs to him, he is not guilty of stealing it; that if the jury find and believe beyond a reasonable doubt that defendant did feloniously steal, take and drive away three head of neat cattle, the property of Lee, with intent to steal the same and deprive the owner of the immediate possession thereof, then they should find defendant guilty, notwithstanding the fact that he afterwards returned the property to the owner.

Defendant claimed the cattle were his, and complaint is made of the latter instruction, because, it is said, it tells the jury that Lee was the owner of the property. I do not think it is susceptible of that construction, or that the jury could have so understood it. It tells them that if they find the animals were the property of Lee, and that defendant took and stole them with intent to deprive the owner of their immediate possession, then the fact that he afterward returned them to the owner made no difference.

As to the other instruction, the court told the jury that defendant was presumed to be innocent and that the burden was upon the people to prove his guilt beyond a reasonable doubt, and if they entertained any reasonable doubt of his guilt, they should acquit. We have held in numerous cases there was no need of repeating this in other instructions—giving it once, was enough. When the court told the jury, if a person takes possession of another's

property in good faith, honestly believing that it belongs to him, he is not guilty of stealing it, the instruction regarding reasonable doubt and burden of proof was necessarily read into and became a part of the instruction without repetition. The instructions are to be taken as a whole. The gist of the offense is taking the property of another with the intent at the time of stealing it. There could exist no such intent if the party honestly believed when he took it, that it was his. So the jury in this case must necessarily have understood that if they entertained any reasonable doubt regarding defendant's intent to steal the cattle when he took and branded them, that they should give him the benefit of the doubt and acquit.

The instructions are clear and comprehensive, and there is nothing in them by which the jury could have been misled into believing that the court intended to tell them that the cattle belonged to Lee, or that they were not to give defendant the benefit of any reasonable doubt they might entertain as to his intent to steal them when he took the animals.

I am authorized to state that Mr. Justice White and Mr. Justice Bailey concur in these views.

No. 9094.

SHARP v. HOLLISTER.

1. CHATTEL MORTGAGE—*Of Merchant's Stock*, with provision that until default the merchant shall retain possession, "and use and enjoy the same," is void as to creditors and subsequent purchasers—and even as to the fixtures where these are included.
2. — *Second Mortgage Subject to First*. Such mortgage is valid between the parties, and valid as against a second mortgage of the same tenor, "subject to" the first. The second mortgagee in such case is not to be regarded as a creditor or purchaser for value.

Error to Lake County Court, Hon. John P. Allen, Judge.

Messrs. HOGAN & BONNER, for plaintiff in error.

Mr. JOS. W. CLARKE, for defendant in error.

Chief Justice Hill delivered the opinion of the court:

This action in replevin was submitted upon an agreed statement of facts. It discloses that one Kneeland, who owned a confectionery store in Leadville, gave to the plaintiff in error, Sharp, (to secure the payment of a valid indebtedness) a chattel mortgage upon his stock of goods, furniture and fixtures; that the furniture and fixtures were described in detail; that the stock of goods was described as "All the candy, popcorn, cigars, tobacco, * * * situate at * * *; that it contained a clause that until default, etc., "It shall and may be lawful for the mortgagor to retain possession and use and enjoy the same;" also, a clause that if the mortgagee deemed himself unsafe or insecure, then it should and might be lawful for him to take immediate and full possession, etc.; that this mortgage was recorded March 1, 1915; that thereafter, Kneeland gave another chattel mortgage upon this furniture and fixtures to the defendant in error, Hollister (to secure the payment of a valid indebtedness); that this mortgage was recorded June 15th, 1915; that it contained a clause that it was given subject to the other then of record, etc., also a clause pertaining to immediate possession if the mortgagee deemed it unsafe or insecure; that thereafter and before all of the indebtedness secured by either of these mortgages became due, another creditor of Kneeland attached this stock of goods and ultimately sold it to satisfy his indebtedness; that at about the time of the levy of this attachment, Hollister, thinking his indebtedness insecure, took possession of the fixtures and furniture under his mortgage; that Sharp demanded from him possession of the furniture and fixtures covered by his mortgage and upon Hollister's refusal to deliver them to him brought this suit in replevin for that purpose. The court held that Sharp's mortgage was void as against the rights of Hollister, under his mortgage, by reason of the fact that

Sharp's mortgage covered the merchandise of Kneeland, and contained the clause that until default it should be lawful for him to retain possession of said goods and chattels and to use and enjoy the same.

Upon account of the Sharp mortgage covering the merchandise as well as the furniture and fixtures, and its language providing that until default the mortgagor could retain possession and use and enjoy the same, it is conceded that it was void, as against purchasers for value and attaching creditors.

Wilson v. Voight, et al., 9 Colo. 614, 13 Pac. 726. The reason for this rule, which is based upon public policy, does not apply as between the parties. It has uniformly been held that such a mortgage is valid as between the parties to it.

Harbison v. Tufts, 1 Colo. App. 141, 27 Pac. 1014; *Wile, et al. v. Butler*, 4 Colo. App. 154, 34 Pac. 1110; *Commercial Natl. Bank v. Davidson*, 18 Ore. 57, 22 Pac. 517; *Martin v. Sexton*, 112 Ill. App., 199; *Drug Co. v. Self*, 77 Mo. App. 284; *Hodgdon v. Libby*, 69 N. H. 136; 43 Atl. 312; *Smith v. Moore*, 11 N. H. 55; *Gooding v. Riley*, 50 N. H. 400.

The question which presents itself here is the status of a junior mortgagee who takes his mortgage not only with actual notice of the prior mortgage, but under an express agreement that his is to be subject to it. This question has repeatedly been passed upon by the courts of other states to the effect that in such cases the junior mortgagee does not come within the class of purchaser for value or attaching creditor to the extent that he can question its validity, but that he is in no better position concerning it than his mortgagor and is estopped the same as the mortgagor is from questioning its validity.

Wells, Fargo Co. v. Alturas Commerce Co., 6 Idaho 56, 56 Pac. 165; *Dodge v. Smith*, 5 Kans. Ap. 742, 46 Pac. 990; *American Cigar Co. v. Foster*, 36 Mich. 368; *Cumberland Natl. Bank v. Baker, et al.*, 57 N. J. Eq. 231; 40 Atl. 850;

Singer Piano Co. v. Barnard, Walker Co., 113 Iowa 664; 83 N. W. 725; *Hardwick v. Atkinson*, 8 Okl. 608, 58 Pac. 747.

While this question does not appear to have ever been passed upon in this jurisdiction, the principle involved was recognized in *Cassidy et al v. Harrelson*, 1 Colo. App., 458, 29 Pac. 525. It is not in conflict with the ruling in *Brasher v. Christophie*, 10 Colo. 284, 15 Pac. 403, in which case the subsequent mortgage was not made subject to the prior one, which allowed a sale of the property and the purchase of other, but was entirely independent of it and covered the subsequent purchased furniture provided for in the first mortgage before it was purchased, in which case the party who made the loan and took the second mortgage was placed in the same class as a purchaser for value or attaching creditor. To the same effect is *Allen v. Steiger*, 17 Colo. 552, 31 Pac. 226. It follows that the court erred in holding that the first mortgage was void as against the claim of the second mortgagee under his mortgage which was given and taken expressly subject to the claim of the first mortgagee under his mortgage, for which reason the judgment will be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed.

Decision *en banc*.

Mr. Justice White and Mr. Justice Bailey not participating.

No. 9369.

KEENAN ET AL *v.* COLORADO FARM LANDS COMPANY.

APPEAL AND ERROR—*Motion for a New Trial Indispensable.* When the defeated party fails to apply for a new trial within the period prescribed by the Code (Sec. 218), and the eighth Rule of Practice, his writ of error will be dismissed. The statute is peremptory. Absence from the place of the sitting of the court at the announcement of the judgment, press of business, and inadvertance, afford no excuse for such omission.

Error to Yuma District Court, Hon. H. P. Burke, Judge.

Messrs. ROGERS, ELLIS & JOHNSON, Mr. DANIEL B. ELLIS, and Mr. PERCY ROBINSON, for plaintiffs in error.

Mr. JOHN F. MAIL, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

This action rests upon a motion to dismiss the proceeding on error, upon the ground that plaintiffs in error did not within the time prescribed by law and the rules of this court, file a motion for a new trial, and did not apply for nor cause to be entered, an order of the trial court dispensing with a motion for a new trial therein, and did not apply for, nor secure an extension of time within which to do so.

Section 218 of the Code of Civil Procedure provides:

"The motion for a new trial and reasons therefor, and affidavits in support thereof, when required shall be filed within five days after the verdict is rendered (but in any event before the adjournment of the term), or within five days after notice of the filing of the report of the referee, or the announcement of the decision of the court, and at the same term, but the court may extend the time for good cause * * * ."

Rule 8 of the Rules of this court provides:

"The party claiming error in the trial of any case must, unless otherwise ordered by the trial court, move that court for a new trial, and, without such order, only questions presented in such motion will be considered on review. "

On the 7th day of December, 1917, a decree in favor of the defendant in error, plaintiff below, was entered, but as of date of November 19th, 1917. Due exceptions were entered and a stay of execution granted for a period of sixty days, in which to make and tender a bill of exceptions.

It appears that on November 22nd, 1917, defendant's attorneys being absent from the county addressed a letter to the judge of the court containing the following:

"When the decree is entered, will you please have our exceptions noted to the entry thereof, and give us sixty days' time in which to prepare and tender a bill of exceptions and an order for a stay of execution during such sixty days' period of time."

On the 8th day of December, 1917, the defendant's attorneys received a written notice from the judge containing the following:

"Enclosed herewith I hand you, duly signed, the decree in No. 1380, District Court of Yuma County, Colorado, Colorado Farm Lands Company v. Keenan; 60 days from this date in which to tender bill of exceptions, and execution stayed for 60 days. I have so notified the Clerk."

On the 28th day of January, 1918, the defendant's attorneys tendered for filing their motion and affidavit for an order, *nunc pro tunc*, as of date of December 7th, 1917, dispensing with a motion for new trial. This motion was heard and overruled on the 7th day of February, 1918. The grounds for this motion were, press of business, inadvertance, and absence from the place of holding court at the time the judgment was entered.

It will be seen that the court entered judgment in the absence of defendant's counsel, but with their knowledge, with exception at their request, on the 7th day of December, and that such counsel were notified of such entry on the following day, and that counsel failed to comply with the code provision and the rule of this court, in that they did not file a motion for a new trial, nor obtain an order dispensing therewith, within five days from the date of the judgment, and for such reason are not entitled to a proceeding in error.

The filing of such application on the 28th day of January, or nearly six weeks after the time to which they were limited by law, could not and did not cure this omission.

By the provision of the code, and rule 8, this requirement is made jurisdictional of the right of review. It is not within the power of the trial court to amend the statute, or to

extend the rule of this court. The statutory language is peremptory. The motion for a new trial was not filed, nor order entered dispensing with the same within five days. Neither was an order entered within that period extending the time for so doing. This was fatal to the right of review. *Clark v. Perry*, 17 Colo. 56, 28 Pac. 329, 29 Cyc. 928.

The motion to dismiss the writ of error is sustained. Hill, C. J., and Garrigues, J., concur.

No. 9089.

SCHELL *v.* THE PEOPLE.

1. *CRIMINAL LAW—Bigamy—Five Years' Absence of Former Spouse—Statute Construed.* Defendant deserted his family, leaving them in Nebraska, in 1903, where they continued at their then residence until 1913. Defendant's second marriage occurred in less than two years after the first wife's departure from the former matrimonial domicile. *Held* that while remaining at such former domicile the first wife was not "absent," within the meaning of the statute (Rev. Stat. sec. 1766), and a conviction was affirmed.

Whether the husband, at the time of the second marriage knew that the first wife was living, or did not know it, was held immaterial.

2. — *Evidence—Wife against Husband—Competency.* The wife is a competent witness against the husband in a prosecution for bigamy. The offence is a crime against the wife within the meaning of the statute. (Rev. Stat. sec. 7274.)
3. — *Error—What may be Assigned for Error.* Not an objection to the verification of the information, where no objection was made below.
4. — *Fair Trial—Time for Argument.* The general rule is that the time to be allowed for the argument of counsel is in the discretion of the presiding judge.

The court found itself unable to say that a limitation of forty minutes was an abuse of discretion.

Error to Denver District Court, Hon. William D. Wright, Judge.

Mr. G. K. ANDRUS, Mr. RALPH R. ANDRUS, for plaintiff in error.

Hon. FRED FARRAR, Attorney-General, Mr. FRANK C. WEST, Assistant, Hon. LESLIE E. HUBBARD, Attorney-General, Mr. CHARLES ROACH, Assistant, Miss CLARA RUTH MOZZER, Assistant, for The People.

Opinion by Mr. Justice Allen.

The plaintiff in error, hereinafter designated the defendant, was charged with and convicted of the crime of bigamy under section 1766 R. S. 1908 (Sec. 1894 Mills Ann. Sts. 1912).

Eliminating clauses of the section above cited which are not material to any question presented by the record, the section reads as follows:

"Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive. If any person or persons within this state, being married, or who shall hereafter marry, do at any time marry a person or persons, the former husband or wife being alive, the person so offending shall on conviction thereof be punished by a fine not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding two years. * * * Nothing herein contained shall extend to any person or persons whose husband or wife shall have been continually absent from such person or persons for the space of five years prior to the second marriage, and he or she not knowing such husband or wife to be living within that time. * * *"

The first contention made by the plaintiff in error is that there is a total failure of proof to convict the defendant. It is undisputed that the defendant married a second time, while his former wife was living and not divorced from him. It is claimed, however, that the defendant is not guilty, according to the evidence, by reason of the exception contained in the statute. In other words, the defendant claims that his former wife, at the time of his second marriage, had been continually absent from him for the space of five years, and that he did not know her to be

living within that time. The contention thus made requires both an examination of the evidence and an interpretation of the statute, especially since each side takes a different view with reference to what does or may constitute *absence* of the former spouse within the meaning of the exception contained in the bigamy statute.

The evidence shows the following facts: The defendant married his first wife, who is referred to in the record as Mrs. Frances Schell, in Nebraska, in the year 1891. He cohabited and resided with her in Nebraska until some time in the year 1903 at which time he left his family, then consisting of his wife and five children, and came to Denver, Colorado. The defendant's family was then, and had been for more than five years, living in Gothenburg, Nebraska. The wife and children continued to reside in Gothenburg until September 11, 1913, when the wife removed to North Platte, Nebraska, which is located thirty-six miles from Gothenburg. In 1904 Mrs. Frances Schell visited her husband in Denver, but did not establish a matrimonial domicile with him. She did not move to Denver, nor come prepared to stay, but on the occasion mentioned, merely visited the defendant for the space of six days, and then went back to her home in Gothenburg, Nebraska. The defendant visited her at Gothenburg in 1906, which was the last time the parties saw each other until the time of the trial of this case in October, 1916. The defendant married Helen Baber in Denver, on February 20, 1915, which was at a time less than two years from date upon which Mrs. Frances Schell removed from her home in Gothenburg, Nebraska.

The attorney general contends that, under the foregoing facts, the defendant's first wife was not absent from the defendant for the space of five years, within the meaning of the statute. This contention is opposed by the plaintiff in error in his reply brief. It is conceded that the defendant and his first wife lived separate and apart from each other, and each in a different state, for more than

seven years prior to the time of the defendant's second marriage. The theory of the defendant is that the fact thus conceded shows the first wife's absence from him for the space of five years, and brings him within the exception in the statute so far as the same relates to the absence of a former spouse. It becomes necessary, therefore, to pass upon the attorney general's contention, and to determine the meaning of the word "absent" as the same is used in the bigamy statute.

In many reported cases the word "absent," as used in bigamy statutes, has been regarded as having such confined and technical meaning as it has in the rule regarding the presumption of death. We find no case in which the situation is otherwise. "Absent" therefore means being away from the home or place where one has established a residence. 1 C. J. 341; 13 Cyc. 300 (c).

Our statute uses the term in question as a part of the phrase "absent from such person." The word "absent," nevertheless, still has the meaning above mentioned. The bigamy statute in Alabama (Sec. 6390 Code of 1907) employs the expression, "whose former husband or wife had remained absent from him or her for the last five years preceding such second marriage." This expression was under consideration by the supreme court of Alabama in the case of *Parker v. State*, 77 Ala. 47, 54 Am. Rep. 43, and the absence referred to in the statute was regarded as the "absence from which death is presumed," and as "absence from the former place of abode."

In *Parker v. State*, *supra*, the court said:

"If the defendant left his wife in North Carolina, where they formerly resided, and absented himself from that state, the presumption of her death cannot arise by reason of his absence, or of his having heard nothing from her. * * * A husband cannot create absence by abandoning his family, and then invoke the presumption of innocence to destroy the presumptive proof of continuing life."

In *Hyde Park v. Canton*, 130 Mass. 505, 507, it is said:

"If a man leaves his home and goes into parts unknown, and remains unheard from for the space of seven years, the law authorizes, to those that remain, the presumption of fact that he is dead; but it does not authorize him to presume therefore that any one of those remaining in the place which he left has died."

In the case at bar the evidence shows clearly that the first wife never left the last matrimonial domicile of herself and defendant, or her domicile at Gothenburg, Nebraska, until within two years of the time of defendant's second marriage. While she remained in Gothenburg, she was not absent from him, within the meaning of the statute. It does not matter whether the defendant intended to desert her when he came to Denver or not. In the case of *Parker v. State, supra*, it was not the defendant's desertion that prevented the wife from being absent within the meaning of the statute, but it was the fact that on her part there was no "absence from the former place of abode." The presumption of death arises in the case of a person "who has been absent from his last or usual place of residence." 13 Cyc. 297. At the time the defendant married the second wife, the last or usual place of residence of Frances Schell was at Gothenburg, and she had been absent from that place for a period of less than two years. It is true that she came to Denver, according to the evidence, in 1904, but she never established a settled residence in Denver. She came as a visitor, and remained in Denver only six days. She then went back to Gothenburg, Nebraska, where her home was. The defendant knew this fact, and thereafter knew that Gothenburg continued to be her place of abode. He visited her there in 1906, and corresponded with her at that place as late as 1908. Frances Schell remained in Gothenburg until September, 1913. If any presumption of her death would arise, due to her absence, it would be her absence from Gothenburg, and not her being away from the place where her husband happened to reside. Under the facts in this case, Frances

Schell would naturally be expected to be found, by the defendant as well as by others, at Gothenburg, at the time of defendant's second marriage. In *Robinson v. State*, 6 Ga. App. 696, 65 S. E. 792, 795, the court said that "absence" means absence from the places where she, the first wife, would naturally be expected to be found.

We are of the opinion, therefore, that under the facts of this case the first wife had not been absent from the defendant for the space of five years prior to his second marriage. The defendant did not bring himself within the exception contained in the statute, and it is immaterial to what extent he proved, or the state failed to disprove, that he did not know that his first wife was alive, or that he had good grounds for supposing her to be dead, at the time of his marriage to Helen Baber.

The prevailing view in the United States is that it is the clear intent of the statutes that one who marries within the period designated by the statute shall do so at his peril. 7 C. J. 1164; 3 R. C. L. 801, sec. 9; *State v. Ackery*, 79 Vt. 69, 64 Atl. 450, 118 Am. St. Rep. 942, 8 Ann. Cas. 1103; *Commonwealth v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; *Cornett v. Com.*, 134 Ky. 613, 121 S. W. 424, 21 A. & E. Ann. Cas. 399.

The view above taken by us dispenses with the necessity for any discussion of the instructions requested or given. In that matter there was no error, prejudicial to the defendant, committed by the trial court.

It is urged that the court erred in permitting the defendant's first wife to testify as a witness against him. Upon this point the plaintiff in error relies upon section 7274 R. S. 1908 (sec. 8072 Mills Ann. Sts. 1912), which provides, among other things, that a wife shall not be examined for or against her husband without his consent, except it be in "a criminal action or proceeding for a crime committed by one against the other." It is claimed that the alleged bigamy of the defendant cannot be a crime committed against the wife, within the meaning of the statute

above cited. There is a conflict of authority on the question whether or not bigamy is a crime committed by one spouse against the other. 3 R. C. L. 812, sec. 26; 40 Cyc. 2221. The statute above mentioned was under consideration by this court in *Dill v. People*, 19 Colo. 469, 481, 36 Pac. 229, 41 Am. St. 254. It was there said:

"All crimes are crimes against the public * * * But crimes directly affecting particular persons or individuals are uniformly considered crimes against such persons or individuals. * * *

"Our statute does not limit the right of the husband or wife to testify to criminal prosecutions for crimes involving personal violence, either actual or constructive; the language is unqualified that the husband or wife may testify against the other 'in a criminal action or proceeding for a crime committed by one against the other.' This language is broad enough to include any crime, whether of violence to the person, or other crime committed by the husband or wife directly affecting the other."

It was held in *Dill v. People*, *supra*, that the making of a false affidavit by the husband in a divorce suit against his wife, for the purpose of procuring a constructive service of summons, was a crime committed against the wife, within the meaning of the statute in question. In arriving at its conclusion the court used language and reasoning which is applicable to the crime of bigamy as well as that of perjury, and among other things, said:

"Since some private wrong or injury is included in every crime, it is evident that the word *crime* in that clause of the statute which permits the husband or wife to testify against the other in a 'criminal action or proceeding for a *crime* committed by one against the other,' means the private wrong or injury included in such public crime. The word must have such meaning, or the statute is meaningless. It follows that a wife is competent to testify against her husband in a criminal action or proceeding whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted."

We are of the opinion that the statute in question was correctly interpreted in the opinion in the Dill case, and it would be contrary to such interpretation now to hold that bigamy is not a crime against the wife within the meaning of the statute. We therefore adopt the rule laid down in *State v. Sloan*, 55 Iowa, 219, 7 N. W. 516, where the court said: "In our opinion, if the defendant is guilty of bigamy, he committed a crime against his wife. We think she is a competent witness. The decision in that case was followed in *State v. Hughes*, 58 Iowa 165, 11 N. W. 706. These Iowa decisions were followed in *Nebraska Hills v. State*, 61 Nebr. 589, 85 N. W. 836, 57 L. R. A. 155.

For the reasons above named we hold that the defendant's first wife was a competent witness against him, and that the trial court did not err in allowing the wife to testify in behalf of the state in this case.

In one of the assignments of error, it is claimed that the information was not properly verified. No objection to the information, or to the form of its verification, or to the alleged absence of a proper verification, was made at any stage of the proceedings in the trial court. Such objection cannot, therefore, be considered at this time. *Bergdahl v. People*, 27 Colo. 302, 307, 61 Pac. 228; *Leffey v. People*, 55 Colo. 575, 136 Pac. 1031.

The plaintiff in error contends that "the court erred in limiting the defendant's counsel to forty minutes to argue his case to the jury." The general rule is that the limitation of the time for argument by the counsel for either side is in the discretion of the trial court. 12 Cyc. 568. Considering the amount and character of the testimony taken, the number of witnesses, and other circumstances of the case, we cannot say that the trial court abused its discretion in this matter.

The plaintiff in error calls attention to the fact that the information alleged that the defendant at the time of his second marriage knew that his first wife was living. Such an allegation could have been omitted without affect-

ing the charge against the accused. 7 C. J. 1166, sec. 29. It was surplusage. 22 Cyc. 370, c. It was not necessary for the state to prove such allegation. 22 Cyc. 448. The record shows no error based on the allegation or proof in question.

The record shows no reversible error, and the judgment is therefore affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9124.

DOYLE v. THE PEOPLE.

1. CRIMINAL LAW—*Verdict—Effect*. A verdict of guilty raises a presumption that everything necessary to a conviction was established by the evidence.
2. — *Information—Objections* to, not challenged until after verdict will not be considered on error.
3. JURY—*Challenge to the Array*.—Information for the Sale of Intoxicating Liquors. That the sheriff sent the prosecuting witness to the establishment of the accused, to make the purchase, giving him money for the purpose, is no ground of challenge to the array.
4. — *Summoning*. Most statutes for summoning juries are, as to the process provided, merely directory. Strict compliance therewith is not required.
The method prescribed by the statute for securing a jury is not exclusive.
5. — *Open Venire*. In the absence of a showing to the contrary it is assumed that the facts authorizing the court's action existed.
6. — *Challenge*. An accused person who makes no peremptory challenge cannot on error brought, complain of the manner in which the jury was summoned.

Error to Routt County Court, Hon. Charles E. Herrick, Judge.

Mr. O. N. HILTON, Mr. CAESAR A. ROBERTS, and Mr. LESLIE M. ROBERTS, for plaintiff in error.

Mr. LESLIE E. HUBBARD, Attorney General, Mr. CHARLES ROACH, Assistant Attorney General, for The People.

Mr. Justice Scott delivered the opinion of the court.

The plaintiff in error was convicted upon a charge specifically set forth in the information as follows: "That William Doyle, late of the County of Routt and State of Colorado, on or about the 26th day of February, in the year of our Lord One Thousand Nine Hundred and Sixteen, at and within the county aforesaid, did then and there unlawfully sell and keep for sale, intoxicating liquors, to-wit, whiskey."

It is urged there that the information is insufficient in that it does not allege the name of the purchaser of the liquor. It is also insisted that the information charges two offenses in the same count, i. e., unlawful selling, and keeping for sale. These alleged infirmities in the information were in no manner presented on the trial, and the pleading was not challenged until after the verdict was returned. This was too late, and these alleged errors will not be considered. Sec. 1956 Rev. Stat. 1908.

It is uniformly held that at common law, the verdict cures some things, and the rule is the same in criminal and civil cases. It is as though a matter of either form or substance is omitted from the allegation, or alleged imperfectly, yet if under the pleadings, the proof of it was essential to the finding, it must be presumed after verdict to have been proved, and the party cannot now for the first time object to what has wrought him no harm. Vol. 2 Sec. 707 Bishop's New Criminal Evidence.

The defendant filed his motion in challenge of the array. This motion was overruled and the ruling is assigned as error. The grounds for this motion were that the sheriff of the county employed the prosecuting witness to go to Oak Creek, where defendant resided and paid his expenses, and that the said witness used some of the money to purchase liquor from the defendant, and that the sheriff served the special venire. This is not a sufficient ground upon which to support a challenge to the array. If the sheriff was for any reason disqualified by prejudice or otherwise, the defendant should have sought in the proper way to disqualify him.

It is further set forth in the motion that the jurors were not served with summons until within five days of the sitting.

Statutes as to the time for issuing process for the summoning jurors are ordinarily held to be merely directory, and a failure strictly to comply therewith is not a material irregularity. But in this case the objection was to a special venire, and in the absence of an affirmative showing to the contrary we must assume the contingencies existed, which authorized the court to cause it to be summoned by open venire. *Giano v. The People*, 30 Colo. 20, 69 Pac. 504.

Whenever the court needs more jurors it has the power, under the statute to either draw them from the box or summon them by open venire. The statutory method is not exclusive. *Mitsunaga v. The People*, 54 Colo. 102, 129 Pac. 241. Beside, in this case it does not appear that the defendant exercised all, or even one of his peremptory challenges and therefore cannot be held to be prejudiced.

Finding no prejudicial error the judgment is affirmed. Hill, C. J., and Garrigues, J., concur.

No. 9071.

FRASER v. WALKER, ET AL.

FRAUD—*A Bad Bargain*, not induced by any misrepresentation affords no grounds for complaint.

Error to Denver District Court, Hon. John A. Perry, Judge.

Mr. GEORGE K. ANDRUS, Mr. RALPH R. ANDRUS, for plaintiff in error.

Mr. E. M. SABIN, for Sarah B. Dingey.

Mr. Justice Scott delivered the opinion of the court.

The complaint in this action alleges that the plaintiff was damaged through the fraud and deceit practiced on her in the matter of the purchase of the leasehold and furniture of a rooming house in the city of Denver.

It appears that the defendant Walker was a real estate broker, and known to be dealing in the sale of such leaseholds and furniture. The plaintiff approached him for the purpose of securing such an investment. He secured from the defendant Dingey an agency to sell the rooming house in question, which she was then conducting. He then presented the proposition to plaintiff, and a sale was consummated, whereby the plaintiff purchased from defendant Dingey the leasehold and furniture involved, the consideration being \$2,750.00. Of this sum eight hundred dollars was paid in cash, and the remainder in deferred payments, one of which was a promissory note for \$250.00, secured by mortgage on real estate owned by plaintiff.

Plaintiff took possession of the premises, but failing to meet the payments, the property was taken over by defendant Dingey.

The evidence shows that the plaintiff executed a bill of sale for the property to Dingey, at the time it was turned back to her. Plaintiff offered to prove also that the defendant Dingey executed a release of the mortgage, and cancelled the additional obligations of plaintiff at the time of the delivery of the bill of sale. The court denied this offer for the purpose for which it was made, i. e., as proof of value. So that it is quite clear that the execution and delivery of the bill of sale, and the cancellation of the obligations of plaintiff, were mutually agreeable transactions, and not now questioned by either party.

The defendant Dingey had not met plaintiff until Walker introduced them at the rooming house, where the former had come to look over the property. The plaintiff appears to have been experienced in the rooming house business in Denver, and in fact that was her occupation. She examined the property before purchasing, and it does not appear that the defendant made other material representations to her than that the property was worth the consideration agreed on, and was of the value of \$3,000.

There is no testimony in the case that tends to establish fraud and deceit. She purchased the property with her eyes open, and without necessary reliance on the statements of either of the defendants as to value.

The evidence indicates that plaintiff made a bad bargain but it was not in the province of the court to correct her error in judgment. The court directed a verdict for the defendants, and we find no error in his so doing.

The judgment is affirmed.

Hill, C. J., and Garrigues, J., concur.

No. 9011.

TALLMAN v. HUFF

1. CONVEYANCE OF LANDS—*Destruction of*,—By the grantor, at request of the grantee, reinvests the grantor with title where this is the intent of the parties.
2. APPEAL AND ERROR—*Finding Supported by the Evidence*, will not be disturbed, though the evidence is in some respects unsatisfactory, and a contrary finding might have been supported.

Error to San Miguel District Court, Hon. Thomas J. Black, Judge.

Mr. L. W. ALLEN, for plaintiff in error.

Messrs. FINK & WOOD, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

May 13, 1915, Effie Huff brought suit in ejectment under the code of 1887, (Chap. 23, Colo. R. S., 1908) in the District Court of San Miguel county, against G. W. Tallman as defendant below, to recover possession of certain real estate in the town of Norwood. August 21, 1915, defendant answered. The first defense is in substance a general denial; the second alleges that January 2, 1913, Asa Huff, plaintiff's husband, caused the record title to the premises to be placed in her name, but that the property really belonged to him, and August 25, 1913, defendant

caused an attachment to be levied on it as his property; that judgment was recovered against him, and the attachment sustained; that upon execution sale, defendant was the purchaser, and August 16, 1915, obtained a sheriff's deed for, is now the owner in possession, and entitled to the possession of the property under the sheriff's deed.

March 31, 1913, Tallman paid a note of \$500.00, which he had signed with Mr. Huff as accommodation maker, at the Bank of Telluride, and the attachment suit against him was to recover on this indebtedness. In that suit, judgment was obtained against Mr. Huff and the attached property was sold on execution. Tallman bid it in and obtained a sheriff's deed August 16, 1915.

Plaintiff and her husband were married in August, 1910, and she claims her funds, which she placed in his hands after they were married, were used by him in paying for the place, and that she authorized him to purchase it for her. None of the witnesses conflict in their testimony. Morgan, the person from whom the property was purchased, testified in substance that he sold the property to Mr. Huff November 27, 1911, for \$1,120.00 in cash, and on that day executed and delivered a deed to him; that October 11, 1912, Mr. Huff returned to him the unrecorded deed, and requested him to destroy it and make a new deed to his wife; that he, Morgan, burned the old deed, in the presence of and at the request of Mr. Huff, and then and there executed and delivered to him in its place a new deed to his wife, for the property. This second deed is dated November 22, 1911, was acknowledged October 11, 1912, and filed for record January 2, 1913.

Mrs. Huff testified regarding the transaction that her husband attended to buying the property for her, at her request, and with her money; that he brought the deed home, handed it to her and said: "It has not been recorded, you will have to have it recorded. Take care of it."; that she supposed it was all right, and put it away in her trunk without reading it; that as far as she knew nothing fur-

ther was done with it, and it remained there for about a year; that her husband went away, and in getting her affairs in shape after he left, she decided to record the deed; that if it ever left her possession until she had it recorded, she did not know of it, and that she never knew that two deeds had been executed.

Mr. Huff conducted a saloon business in Norwood, and he and his wife had lived in the house in question sometime before it was purchased from Morgan. Shortly after the purchase, he left and went to South America.

Mrs. Huff testified further, in substance, that the property was bought with her funds, and that she in fact paid the consideration, although her husband attended to the business. In accounting for how and where she obtained the money, she said she had an interest with her father and brother in livestock brought from South Dakota, and that as the property was sold, they turned over to her, her share which amounted to \$600.00. This evidence is not disputed, and is corroborated by other testimony. That she had \$250.00 when they were married that she had saved from stenographic work; that her brother made her a wedding present of \$100.00; that she boarded the men who worked in her husband's saloon, kept a cow and chickens, and sold milk and eggs, from which sources combined, she saved up \$200.00; that instead of depositing it in the bank, she turned all the money over to her husband to keep for her, with the understanding that it should be used in buying a home; that after they moved into the Morgan house, and had lived there for a time, she decided she liked it, and authorized him to buy it for her; that she gave this money to her husband to keep for her, to be used in buying them a home, and that he told her he had used the money in paying for the Morgan property.

The court found that plaintiff furnished the funds to purchase the property, with the understanding that the title was to be taken in her name, and that at the time of the attachment levy, it was her property and not the prop-

erty of her husband; that no credit was obtained by her husband on account of his supposed ownership of the property; that she did not take the title for the purpose of defrauding her husband's creditors, and that she is and was at the time of the beginning of this suit, the owner of the legal and equitable title and entered judgment accordingly.

Opinion of the Court.

1. Plaintiff in error argues four points: First, That recording a deed that has been delivered is not necessary to convey title to the grantee, and under our decisions the unrecorded deed from Morgan to Mr. Huff, conveyed the title to the latter; that the cancellation and destruction of the unrecorded deed, under our statute requiring conveyances to be in writing, did not re-establish title in Morgan, therefore, when he made the second deed purporting to convey the premises to Mrs. Huff, it conveyed no title, because the title still remained in Mr. Huff, notwithstanding the burning by Morgan of the unrecorded deed, and that this title was attached and sold on execution, and is the basis of Tallman's deed. Second, That the evidence does not show beyond a reasonable doubt that Mrs. Huff furnished the funds that paid for the premises. Third, That if she did furnish the funds, the title was taken in her name for the purpose of hindering, delaying and defrauding her husband's creditors, in which she participated. Fourth, That the conveyance to her was in fraud of creditors and is void.

From the view we are inclined to take of the matter, a decision of the first point disposes of the case.

2. When Huff took the unrecorded deed back to Morgan and requested him to destroy it and make a new deed to his wife, to which Morgan consented, and then and there cancelled the original deed by burning it, with the mutual intention that it should be destroyed, and a new deed executed in its place, and after such destruction of the original deed, Morgan at the request of Mr. Huff, made a new deed to Mrs. Huff, the practical effect of the transaction

was the same as if the grantor had made the deed originally to Mrs. Huff, and no mere theory regarding the destruction of the original deed not reinvesting the grantor with title, can change the practical effect of the transaction. The voluntary surrender and destruction of an unrecorded deed by the grantor, at the request of the grantee, where the intention of all the parties is to reinvest the title in the grantor, reinvests the grantor with the whole title, at least, this is the practical effect of such a transaction. Anyhow, Mr. Huff, after the destruction of the deed, had no title which he could assert against anyone, or in any court, consequently Tallman acquired no title at the judicial sale. Whatever trust, if any, was established in the premises in Mr. Huff, was extinguished by operation of law when, at his request, the deed was burned and cancelled by Morgan, and a new deed in its place executed to his wife. So we shall treat the case the same as though the original deed was made to Mrs. Huff, and give no effect to the unrecorded deed that was burned. We know there are many authorities holding the contrary, especially among the older cases, but we think the trend of modern authority is as above announced. The following cases tend to support this position:

Matheson v. Matheson, 139 Iowa 511, 117 N. W. 755; *Brown v. Brown*, 142 Iowa 125-133, 120 N. W. 724; *Happ v. Happ*, 156 Ill. 183, 41 N. E. 39; *Gillespie v. Gillespie*, 159 Ill. 84, 42 N. E. 305; *Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637; *Farrar v. Farrar*, 4 N. H. 191, 17 Am. Dec. 411; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Howard v. Huffman*, 3 Head (Tenn.) 562, 75 Am. Dec. 783, 784; 2 Jones on Evidence, § 420; Tiedman on Real Property, p. 561, § 741.

3. The disposition of this branch of the case eliminates all questions regarding a resulting trust or preferred creditors and matters of a like nature that have been urged, and the only question remaining is whether the conveyance to plaintiff is in fraud of creditors and void. Upon this

point the case is so very close to the border line, that we would not disturb a finding of the court either way. Because we might have found differently had we been the trier of the facts, makes no difference. It was the province of the trial court to pass upon the questions of fact, and while it is true there is no conflict in the testimony and some of it is quite unsatisfactory, still we do not feel that the finding is so unsupported by the evidence as to require a reversal as a matter of law. The judgment is therefore affirmed.

Judgment Affirmed.

Chief Justice Hill and Mr. Justice Scott concur.

No. 8843.

CALUMET FUEL COMPANY v. ROSSI.

Coal Mines—Miner Responsible for Condition of Room Where He Works. A temporary track in a coal mine, used solely for the accommodation of the miners working in the room, for the removal of coal, is part of the place of work of the miner there employed, and he has no action against the master for injuries attributable to the dangerous condition of the place.

Error to La Plata District Court, Hon. W. N. Searcy, Judge.

Messrs. McCLOSKEY & MOODY, for plaintiff in error.

Messrs. PERKINS & MAIN, Mr. L. M. PERKINS, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

This case is here for the second time. The opinion on review of the first trial is reported in 60 Colo. 87, 151 Pac. 935, where the judgment was reversed, and the cause remanded for another hearing. At the second trial plaintiff again recovered judgment, and it is that record which is now for consideration. In this opinion the litigants are designated as they were in the court below.

Plaintiff while employed by defendant was injured by the fall of a slab of rock from the roof of a room in a coal mine. The room had been partially excavated by another before being turned over to plaintiff, and a track had been laid in the room for convenience in removing coal. At the time of the accident plaintiff was engaged in what is known as "pulling pillars," or removing the coal forming the partition wall between the room where he was at work and an adjoining one. The removal of this supporting pillar was preparatory to the abandonment of the room, as upon the removal of pillars in a room the roof usually falls. The track had been taken up for some distance to save it from being covered by debris, and props, supplied by the company for the purpose, were in place over the remaining track, and at other places where the roof appeared weak and seemed likely to give way.

It is claimed, and there is testimony to support the claim, that plaintiff was injured while on the track, and it is urged that the track was one of the travel ways of the mine, which defendant, under our statute, was bound to keep safe. The theory of the defense is that the track, and the entire room, was the working place of the plaintiff, and that conditions therein were constantly changing as a result of the work which plaintiff was doing; that therefore defendant was not responsible for the conditions existing in the room, they being better known to plaintiff than to any one else, as he was directly responsible for bringing about such conditions.

It was definitely determined in the former opinion that the miner is responsible for the safety of the room constructed by himself in the course of his work. The following excerpt from 87 Am. St. Rep. 566, was quoted in that opinion with approval:

"This rule that the mine owner is bound to use all reasonable care to render safe the place furnished by him to the employees, is applicable only where the place in which the latter are at work is such that it can be said to be a place furnished by the mine owner. When, therefore, the

employees are engaged in making their own place the rule does not apply. Where, for instance, the miners are engaged in cutting down or blasting out the face of a drift, it would be entirely unreasonable to demand of the owner that immediately after each blast he make safe the place which explosion had created. In such case the miners may with reason be said to furnish their own place. The character of the place is continually changing by reason of the work itself. It is, therefore, uniformly held that as to those places which the employee in the progress of the work furnishes for himself it is his duty and not that of his employer to use reasonable care to render them safe for further prosecution of the work."

Also the following from *Big Hills Coal Co. v. Clutts*, 308 Federal 524, 125 C. C. A. 526.

"Possibly the law as to the duty of the mine operator to exercise reasonable care to provide the miner a reasonably safe place in which to work may be summed up in this way. The mine operator owes this duty except where it is the reasonable expectation of the parties that the miner himself shall look after his own safety. Generally speaking, such is the expectation where he is working in his own room digging coal, and hence the mine operator does not owe him such duty. On the other hand, generally speaking, it is not the reasonable expectation that the miner shall do so as to an entry, and hence there the mine operator does owe him such duty. But where the miner is engaged in driving or assisting in driving the entry, it is the reasonable expectation of the parties, that whilst he is so doing, as to the portion of the entry that is being driven, he shall look after his own safety, and hence the mine operator does not owe him such duty in regard thereto."

The question as to the responsibility of the miner for the safety of his own room having been definitely settled in the former decision, the only matter left for consideration is whether the track in question was a passage way. That this is the situation is clearly shown by the following quo-

tation from the former opinion (60 Colo. 89, 151 Pac. 935):

"If the plaintiff is entitled to recover it must be because he was injured on the track in question, and that track must be a passage way which falls within the class of ways which the mine operator is required to keep in a reasonably safe condition."

There are a number of assignments of error, but it is plain, as upon the former review, that if the track within the room is to be considered as part of the working place of the plaintiff, and not a traveling way within section 641, R. S. 1908, the plaintiff cannot recover, because the rule requiring an employer to provide a safe working place has no application here, since the employee makes his own working place by his own labor, as a result of which the conditions in the room where he works are continually changing. *Northern Coal Co. v. Allera*, 46 Colo. 224, 104 Pac. 197; *Creede United Mines Co. v. Hawman*, 23 Colo. Ap. 125, 127 Pac. 924, and *Calumet Co. v. Rossi*, *supra*.

The question of what may be considered a travel way in a mine of this character was discussed in *Ricardo v. Central Coal & Coke Co.*, 100 Kans. 95, 163 Pac. 641, where the plaintiff was injured in a room that had been partially excavated by another, as in this case. The review court approved an instruction which defined a travel way as follows:

"Webster defines travel to mean 'to journey over; to traverse; the act of traveling from place to place.' The same authority defines way to mean 'that by, upon, or along which one passes or progresses, opportunity of room to pass; place of passing; passage; road; street; track or path of any kind.' So I instruct you that under the words 'traveling ways' under the statutes in this State and in these instructions means a place habitually and necessarily used by a miner or by the miners in a coal mine to travel upon or through in going to and from his or their working place or places."

The court then quotes with approval from *Baldi v. Cedar Hill Coal & Coke Co.*, 173 Federal 781, reported in 97 C. C. A. 505:

"Colorado has a statute almost identical with the statute of this State. In *Baldi v. Cedar Hill Coal & Coke Co.*, * * * the United States Court of Appeals, Eighth Circuit, construed the expression, 'traveling ways,' as used in the Colorado statute. In that case the plaintiff and another person were engaged in removing dirt, coal and rock through a place which, when completed, was to be used as a passageway or entry. The court there said: 'Under the facts in this case, we do not think the place where they were working was a traveling way at the time of the injury. * * * It was the same as what has been designated as a 'room' in which coal is mined, and under the statute it was the duty of the defendant to furnish the plaintiff and his companion * * * the timbers necessary for protecting the roof of the excavation from falling as the work progressed. But it was not the duty of the defendant to place the timbers. * * * ' The expression of the Supreme Court of this State, and the decision of the United States Circuit Court of Appeals in the Baldi case justify the conclusion in the present action that the place where the plaintiff was injured was not a traveling way within the meaning of the statute."

In speaking of the duty of the court to determine the statutory meaning of the terms of the statute in relation to coal mines, the court said:

"The term 'room,' 'entry,' 'traveling way,' and a number of others, are used in the statutes, and must have definite and fixed meanings, applicable in all situations where the shaft, entry, room and pillar system of mining is carried on. It follows that, when a place in a mine is definitely described and its relation to the other parts of the mine is fixed and certain, as being a place in a room, an air passage, or a traveling way, it is a question of law for the court to determine whether such place is or is not a traveling way."

In the case at bar the track in question was temporary only, being taken up or removed as the conditions of the work required, and was used solely as an accommodation for the miners working in the room, for the removal of coal. It was not necessarily or habitually used by any one, not even plaintiff himself, as a means of going to and from his place of work. It was in fact a part of his working place, and as such it must have been in the contemplation of all parties that the miner himself should make it safe for his own use, benefit and protection. It can not, upon any theory, be considered a traveling way within the perview of the statute.

The judgment must therefore be reversed and it is so ordered. The cause is remanded with directions to the trial court to dismiss it.

Judgment reversed with directions.

Decision *en banc*.

No. 8929.

ZIEGLER ET AL. v. CORBIN.

APPEAL AND ERROR—*Finding Sustained by the Evidence*, will not be disturbed.

Error to Delta District Court, Hon. Thomas J. Black, Judge.

Mr. JOHN R. SMITH, Mr. H. B. WOODS, for plaintiffs in error.

Mr. MILLARD FAIRLAMB, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

This is an action by plaintiff below, defendant in error, to recover from the defendants below the amount alleged to be due as a broker's commission for the purchase of certain lands for use in railroad, coal mining and colonization purposes. The complaint alleged specifically:

"That on or about the 27th day of June, 1914, defendants employed plaintiff to procure in the name of plaintiff for said defendants from divers persons who were then and there owners of certain lands and desert land claims in the neighborhood of a certain projected line of railroad which the said defendants then and there planned to promote and build from at or near the City of Delta, Colorado, to the Fairview coal mine, in said Delta County, offers from land owners to sell and options to plaintiff from such land owners permitting plaintiff or assigns to purchase and procure persons who would sell to plaintiff or his assigns, at the lowest price plaintiff could obtain, a total of 2,000 acres of land.

That defendants agreed to pay plaintiff for his services in procuring such offers, options and persons who were ready, able and willing to sell to plaintiff or his assigns such lands, at the lowest price plaintiff could obtain, the sum of five per cent of the purchase price of said lands, and said defendants agreed to furnish the money with which to make options and contracts on said lands in plaintiff's name for their use and benefit, and agreed that they would purchase said lands from said persons who executed such options or make offers to sell said lands or were found by plaintiff to be ready, able and willing to sell such lands as aforesaid, as soon as offers, options and procured sellers were secured by plaintiff."

It is then alleged that he procured in his own name for the defendants, options to sell and offers by land owners to sell, and from persons ready, able and willing to sell, to plaintiff or his assigns, a total of 2,000 acres of land and desert land claims, in the neighborhood of said projected line of railroad, for a total price of \$61,250, which was the lowest price for which plaintiff could obtain said lands, and had fully complied with his contract, and that there is due on said agreement the sum of \$3,062.50.

For a second cause of action it is alleged that on the 19th day of October, 1914, the defendants so employed the

plaintiff to procure for them an option to purchase an additional tract of land to be used for railroad terminal purposes, for which he was to receive five per cent of the agreed value, as his commission. That he secured such option to purchase at the agreed value of \$3,325, and that there is due the plaintiff on this contract the sum of \$166.25.

The answer denied that the plaintiff was employed by the defendants in their individual capacity, but that they were so acting as the representatives of two corporations, viz: The Fairview & Intermountain Railway Company and The Grand Mesa Fuel Company, all of which the plaintiff well knew and understood.

It is further alleged by the defendants that they at no time accepted the option referred to in the second cause of action, all of which was controverted by the reply of plaintiff. The cause was tried to the court without a jury. The evidence is voluminous and somewhat conflicting, but the court found all matters of fact in favor of the plaintiff, and rendered judgment in his favor and against the defendants in the sum of \$3,487.65.

A careful perusal of the record discloses ample evidence to sustain the court's findings of fact, and for such reason the finding and judgment will not be disturbed. No specific errors of law are assigned.

The judgment is affirmed.

Hill, C. J., and Garrigues, J., concur.

No. 8974.

MAXWELL-CHAMBERLAIN MOTOR COMPANY v. PIATT.

1. PLEADINGS—*Conclusions of Law*, pleaded in the complaint are not to be taken as established facts, even though there be no answer.

The complaint averred that a contract which was set out in *haec verba*, was to be performed in Mesa County. There was nothing to this effect in the contract, and the proposition was denied by a motion to change the venue, supported by affidavit. Denial of the motion held error.

2. **VENUE—Place of Performance of Contract.** Defendant, a corporation, whose principal place of business and principal office was in Denver, entered into a contract with plaintiff, who resided in Mesa County, to the effect that it would sell and deliver to plaintiff, at Denver, certain motor cars, and granted to plaintiff the exclusive right to sell these cars in specified counties of the western slope. Plaintiff agreed to deposit a sum specified with the defendant, as a guarantee, to be refunded at the expiration of the contract, if plaintiff had faithfully discharged his obligations thereunder. Save as above set forth there was no express provision as to where anything was to be done by defendant, under the contract. Action in Mesa County to recover the deposit. *Held* that the contract was to be performed in Denver, and defendant was entitled to change of venue to that county.

Error to Mesa County Court, Hon. N. C. Miller, Judge.

Messrs. BENEDICT & PHELPS, for plaintiff in error.

Messrs. McMULLIN & STERNBERG and Mr. H. COLLINS HAY, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

JULY 9, 1914, the Maxwell-Chamberlin Motor Company, a corporation of Denver, Colorado, plaintiff in error, entered into a written contract with Howard I. Piatt, of Grand Junction, Mesa County, Colorado, defendant in error, by which the Motor Company agrees to sell and deliver to Piatt, at Denver, Colorado, motor cars and trucks manufactured by the Thomas B. Jeffery Company of Kenosha, Wisconsin, for re-sale within Montrose, Delta, Mesa, Garfield and Rio Blanco Counties, Colorado, and grants him the exclusive right to sell them within such territory, to which the right is specifically confined. The contract provides Piatt shall deposit \$300.00 as a guaranty with the Motor Company; that the deposit shall be refunded in cash at the expiration of the contract, if at that time the dealer (Piatt) shall have taken and paid for all cars ordered by him, and faithfully discharged all his obligations thereunder; that the jobber (Motor Company) shall have the option of applying any or all of the deposit on the payment

of any past due indebtedness; that all cars and trucks purchased by Piatt shall be paid for at the factory in Wisconsin, by sight draft, with bill of lading attached, and all parts ordered during each month are to be paid for in cash, on or before the 10th of each succeeding month; that the responsibility of the Motor Company for any and all loss or damage to cars, trucks or parts sold to Piatt, shall cease upon the delivery thereof by the manufacturer to the railroad, express company, or other carrier, or to Piatt's representatives at Denver, Colorado; and Piatt agrees to purchase from the Motor Company, at certain stipulated prices, Jeffery motor cars, for resale by him, upon his own account, within the restricted territory. No agency is established and he is not in any manner authorized or empowered to act for or on account of the Motor Company. Either party may terminate the contract at any time by written notice stating the reasons therefor. There is nothing in the contract, set out in *haec verba* in the complaint, stating where it is to be performed by the Motor Company, other than as above stated.

The complaint, which contains a double statement of the cause of action, alleges that Piatt resides and is doing business in Mesa County, under the trade name of the Western Slope Auto Company, and that the contract was to be performed there; that at the time he executed it, he deposited \$300.00 in cash with defendant, which it accepted and has ever since retained; that he took and paid for all cars ordered under the contract and duly performed all the obligations and conditions thereof on his part stipulated to be performed; that defendant violated its terms by failing to furnish a car ordered on July 7, 1915, and he thereupon rescinded the contract in writing and demanded the return of the \$300.00 deposit, which defendant neglected, failed and refused to do. There is another count for the same item or transaction, which is laid for money had and received, but it is the same cause of action and for the same recovery as the first count. It states that defendant re-

ceived from plaintiff \$300.00 at Grand Junction, Colorado, to and for the use of plaintiff, repayment of which was demanded and refused.

Service of summons was made in Denver. In apt time defendant filed a motion for change of venue to the County Court of Denver County, upon the grounds that its principal office and place of business and only place of business is the City and County of Denver, and not elsewhere; that it resides in, and is a resident of, the City and County of Denver, which is the proper county for the trial of the case; that the contract is to be performed on its part in Denver, and not elsewhere; that it executed the contract in Denver, after its execution by plaintiff; and that the County Court of Mesa County is without further jurisdiction of the case, except to enter an order transferring it to the proper county for trial.

The motion was supported by the affidavit of the president of the company, upon whom summons was served, which states that he executed the contract on behalf of the company in Denver, after it had been executed by plaintiff; that all things to be done by defendant were to be performed, under the terms of the contract, in Denver; that the \$300.00 was deposited with, and is held by defendant, in Denver; that defendant is a corporation organized under the laws of Colorado, and its articles of incorporation designate Denver as its principal place of business, and the place where its principal office is kept; that it never kept nor maintained an office anywhere except at Denver, and has at all times resided in and been a resident of Denver, and that service was had upon it in that city. This affidavit was not controverted, and no other evidence was taken on the motion.

The motion for a change of venue was denied, defendant elected to stand upon the motion and refusing to further plead, default was entered and judgment taken against it. Motion for a new trial was filed upon the ground that the court was without jurisdiction of the cause after the filing

of the motion for change of venue, except to enter an order transferring it to the proper county for trial, which motion was overruled.

The assignments of error challenge the ruling of the court in denying the motion for a change of venue, in attempting to exercise jurisdiction after filing the motion, overruling the motion for a new trial and giving and entering judgment.

Opinion.

As a general rule, under our code, personal actions are triable in the county of the defendant's residence at the commencement of the suit. Code, S. L. 1887, p. 102, § 27; *Brewer v. Gordon*, 27 Colo. 111, 59 Pac. 404, 83 Am. St. Rep. 45; *Woods Co. v. Royston*, 46 Colo. 191, 103 Pac. 291; *Kruschke v. Quatsoe*, 49 Colo. 312-316, 112 Pac. 769; *Gould v. Mathes*, 55 Colo. 384, 135 Pac. 780; *Price v. Lucky Co.*, 56 Colo. 163, 136 Pac. 1021; *Smith v. People*, 2 Colo. App. 99, 29 Pac. 924; *Pearse v. Bordeleau*, 3 Colo. App. 351, 33 Pac. 140; *D. & R. G. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285. To this general rule there are a number of exceptions, one being that actions upon contract may be tried in the county in which the contract was to be performed.

It appears without contradiction that defendant resided in Denver, and not elsewhere; that its principal office and place of business was kept in Denver; that it never maintained an office or place of business elsewhere; that service of process was made on it in Denver; and that the contract was executed by defendant in Denver subsequent to its execution by plaintiff. So under the code and authorities cited, the case is triable in Denver, the county of defendant's residence, and where it was served with summons, unless the action is brought upon a contract which defendant was to perform in Mesa County, bringing it within the exception.

The complaint alleges that the contract by its terms was to be performed in Mesa County, where plaintiff at the time was doing business under the trade name of "Western

Slope Auto Company." But this allegation is not controlling in the face of the contract itself, set out in *haec verba* in the complaint, taken in connection with the uncontroverted affidavit in support of the motion for a change of venue; and the court heard no other evidence. In such a case, mere conclusions of law pleaded in the complaint are not to be taken as established facts, though they are not denied by any answer, or there has been a default for want of an answer. There is nothing specified in the contract which defendant agrees to perform in Mesa County. There is nothing in the contract showing that it is to be performed by defendant in any county different from the county of its residence. It grants plaintiff the right to sell Jeffery motor cars, which defendant agrees to sell and deliver to plaintiff at Denver for resale in a designated and restricted territory. In selling automobiles, plaintiff was conducting his own business, on his own account, which was a separate undertaking apart from his contract with defendant. The contract to sell and deliver plaintiff cars at Denver has nothing to do with and is no part of plaintiff's business of reselling them in Mesa and adjacent counties. So it can not be said that the contract was to be performed by defendant in Mesa County, where the suit was instituted.

But it is claimed that the part of the contract agreeing to refund the deposit, upon which the action is brought, was to be performed in Mesa County. There is no place designated in the contract where the deposit is to be refunded, and the contract mentions nothing to be performed by defendant in Mesa County. The affidavit shows that the money was deposited in Denver and is held there. In the absence of any agreement that the deposit was to be refunded in Mesa County, it follows as a matter of course, under the general rule, that defendant is entitled to have the suit for its recovery tried in the county of his residence.

It is doubtful whether this action is brought upon the contract. We are inclined to think it is for the recovery of a money demand growing out of the contract, and if so,

it would be triable in the county of defendant's residence. But it is not necessary to decide this point, as we hold that the place of trial does not come within any of the exceptions mentioned to the general rule.

Judgment reversed, with directions to the lower court to change the venue to the City and County of Denver, where defendant will be allowed to plead as it may be advised.

Reversed and remanded.

Decision *en banc*.

No. 8338.

AMERICAN SMELTING AND REFINING COMPANY v. HICKS
ET AL.

1. PARTIES—*Indispensable Parties*. The trespasser who has wrongfully extracted ores from the properties of another, and delivered the same to a Refining Company, is not an indispensable party to an action by the owner against the Refining Company for the value of the ores; and his threats, from another jurisdiction, to hold the Refining Company responsible, and that the Refining Company may be harrassed by such litigation, in another jurisdiction is immaterial.

Taber v. Bank of Leadville 35 Colo. 1, and Rumsey v. New York Life Company 50 Colo. 71, distinguished.

2. TRESPASS—*Liability for*, is joint and several.

Error to Summit District Court, Hon. Charles Cavender, Judge.

Mr. HENRY A. DUBBS, Mr. HENRY C. VIDAL, for plaintiff in error.

Messrs. HOGAN & BONNER, for defendants in error.

Chief Justice Hill delivered the opinion of the court:

THIS action was instituted by the defendants in error, hereafter called the plaintiffs, against S. B. and M. A. Wright and The American Smelting and Refining Company. The complaint alleges that the defendants Wright,

by means of underground workings, etc., entered upon plaintiffs' property and mined and carried away certain ore; that it was shipped to the defendant, The American Smelting and Refining Company, and that the proceeds of such ore were then in the hands of said company; that plaintiffs had served the company with notice that the ore was the property of plaintiffs; that defendants Wright are claiming the proceeds of said ore, and that the defendant Refining Company threatens to make settlement with the Wrights for it, etc., unless restrained, etc. The prayer is for judgment against Wrights for \$100,000.00 damages, and that they be restrained from further trespass on plaintiffs' property; that the defendant, The American Smelting and Refining Company, be restrained from making settlement with Wrights for the ore taken; that it be declared to hold the proceeds of said ore as trustee for the use of plaintiffs, and to pay such proceeds to them, etc.

That portion of the findings and judgment necessary to review is against The American Smelting and Refining Company, wherein it is held that ore of the value of \$449.45 was, by the defendants Wright, unlawfully taken from the property of plaintiffs and shipped to the Refining Company, and at the time of the commencement of this action was in its possession, had been converted to its use, and that the plaintiffs are entitled to the proceeds in the sum of \$449.45.

The Refining Company brings the case here for review, and contends that the court erred in its findings: (a) That service of summons was legally made upon the Wrights by publication; (b) that the proceeding was *in rem*; (c) that it had jurisdiction over the Refining Company as to the \$449.45 in its hands, and in entering the default of the Wrights and in finding that these ores shipped to the Refining Company amounting to \$449.45 were the property of the plaintiffs, and that they are entitled to said moneys; and (d) in finding that plaintiffs were entitled to judgment against the Wrights for this property in the hands of the

Refining Company; and (e) in not holding that there was no service of summons upon the Wrights; and (f) that they were indispensable parties, and that the court was without jurisdiction to enter judgment against the Refining Company, for the reason that no legal service was made upon the Wrights, etc.

The plaintiffs maintain that the Wrights entered a general appearance which gave the court jurisdiction over them; that if this position is not sound, that they were regularly served by publication; that the action is *in rem*, and for this reason that the court had jurisdiction to proceed in so far as the ore and the proceeds derived therefrom by the Refining Company are concerned; and that the Wrights were not indispensable parties as between the plaintiffs and the Refining Company to this action for possession of the ores belonging to the plaintiffs, or their value, when it is alleged and was established by proof that they were wrongfully and unlawfully taken from plaintiffs' mine by the Wrights, and wrongfully and unlawfully delivered to the Refining Company. If the latter of these contentions is sound, the others need not be considered.

As between the plaintiffs and the defendant Refining Company, the pleadings allege and the proofs establish that certain persons (in this case the Wrights) wrongfully and unlawfully took from plaintiffs' mine certain ores, and delivered them to the defendant Refining Company, who converted them to its own use; that it has paid no one for them, and that their value is \$449.45. In such circumstances, we can not agree that the Wrights are indispensable parties to the action between plaintiffs and the defendant Refining Company, in order for plaintiffs to recover the value of their ores. *Tabor v. Bank of Leadville*, 35 Colo. 1, involved the validity of a garnishee summons issued by purported authority of a void judgment, it has no application to a case of this kind. The judgment here for review is the one against the Refining Company, for its conversion of the plaintiffs' property. The fact that others

assisted in the commission of the tort is no defense to its liability. The fact that the Wrights lay claim to the proceeds is no defense to the Refining Company for the conversion of plaintiffs' property. The contention that without the presence of the Wrights as parties, there can be no inquiry concerning plaintiffs' rights against the defendant Refining Company for the conversion of their property, is not well taken. We might as well say that A, the owner of a cow which had been stolen by B, who sells it to C, who converts it into beef, can have no adjudication of his claim against C for its conversion without finding and making B, the thief, a party to the action. To bring it nearer to this case, suppose B sells a stolen horse to C, to be paid for later, and A, the owner, brings suit against C for possession or its value; C admits having received the horse from B, and that he agreed to pay B, the thief, for it, but says to A that, notwithstanding you allege and have proven that the horse was stolen, that it is yours, and that you are entitled to it, or its value, nevertheless the thief B, from somewhere out of this state claims this money, hence, I can not be made to pay you until you get the thief into court, and have his rights determined against me pertaining to my liability to him for selling the horse to me. This, in substance, is the position of the defendant Refining Company. It admits the receipt of the ore, its conversion by it, but says that the Wrights are in California, and make claim there against it for these proceeds, that as it does business in California, they may sue it there, and unless the Wrights' claim against them is determined in this litigation, it may be compelled to pay them for this ore, although it is now compelled to pay plaintiffs for it; for this reason, as the Wrights can not be reached here, that the plaintiffs, in order to have their claim adjudicated against the Refining Company, must go where the Wrights are, and make them parties to the action. If such were the rule, it would, in many cases, work a denial of justice. All persons, in some degree, must be held responsible for the result of their

actions in dealing with others. Think of the result that might follow should the rule contended for be applied to transactions in the buying and selling of live stock at the large centers of trade.

The act complained of against the defendant Refining Company is *ex delicto*. In such case, the liability for conversion is joint and several. *Carper v. Risdon*, 19 Colo. App. 530, 76 Pac. 744; *D. O. & C. Co. v. Gast*, 54 Colo. 17, 129 Pac. 233. In the former of these cases, at page 536, 129 Pac. 746, it is said:

"The point is made that, after the court had ordered the dismissal as to Lindemann, it could not lawfully render judgment against Carper, because the complaint charged a joint conversion. For a joint trespass, the liability of the trespassers is joint and several. This action might have been brought in the first instance against Carper alone; or, having been brought against both, there might, at any time before judgment, have been a dismissal by the plaintiff as to Lindemann, leaving the action to proceed against the other defendant; and, on principle, we confess ourselves unable to see why the court might not do what could have been done by the plaintiff, or why it is not competent to either court or jury, in an action for a trespass, to find one defendant guilty, and another not guilty." We think this declaration somewhat applicable to the facts here. Section 84, Revised Code 1908, provides that:

"The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

As heretofore stated, the complaint states a cause of action in favor of the plaintiffs against the Refining Company; there is no contention that it was not tried, or that the testimony did not sustain it. A judgment was rendered thereon. In such circumstances, under the provision of the Code last cited, it should not be reversed unless it works

prejudicial error against the substantial rights of the Refining Company, and inasmuch as the Wrights were not indispensable parties to this contention, all portions of the case concerning them can be eliminated, without doing an injustice to the Refining Company pertaining to the issue presented against them and tried. Hence, it is unnecessary to determine whether there was service of summons upon the Wrights, whether the court had jurisdiction over them, or whether any judgment rendered against them is valid or otherwise. The fact that they threaten the Refining Company with suit in another jurisdiction to recover the value of this ore is no defense to its paying the plaintiffs for it if the allegations of plaintiffs' complaint are true; if they are, that fact would be a defense in favor of the Refining Company against the Wrights in any jurisdiction. The contention of the Refining Company that this will not relieve it from being harassed with litigation concerning it may be true. One answer to this is that the Refining Company, and not the plaintiffs, brought about the condition whereby it may be liable to such an attack, by purchasing something from the Wrights which they did not own, and which in fact belonged to the plaintiffs, and which they did not give the Wrights or the Refining Company permission to take.

Had the pleadings disclosed that the action involved contractual relation between the plaintiffs and the Wrights concerning this property, it might present a different question, in which case *Rumsey v. New York Life Insurance Company*, 59 Colo. 71, 147 Pac. 327, might be applicable. In that case the record discloses that Rumsey, then of Honolulu, secured from the insurance company a \$5,000.00 policy upon his life, wherein Benson, Smith & Company, also of Honolulu, were designated as the beneficiary; that after Rumsey's death, his wife brought suit in Colorado to be substituted as the beneficiary, and to recover the value of the policy, seeking to invoke the equitable rule of substitution. She admitted that she had never been designated in the manner provided in the policy as the beneficiary, and

that such an endorsement had never been made on the policy, or on the books of the company, and also that at the time of her husband's death, Smith, Benson & Company were in possession of the policy, were the designated beneficiaries in it, and that the records of the company thus showed. She contended that upon account of certain acts of the insurance company and also certain alleged wrongful acts of Benson, Smith & Company in refusing to surrender the policy, etc., that under the equitable rule of substitution, she should be treated as having been substituted during the life of her husband as the beneficiary, instead of Benson, Smith & Company, and was entitled to recover the amount called for in the policy as such substituted beneficiary, without making Benson, Smith & Company a party to the suit, or securing from them the surrender of the policy. We held, under such circumstances, that their equities and rights as a beneficiary could not be determined under the equitable rule of substitution in an action to which they were not a party. Such an issue is foreign to the case under consideration.

The judgment is affirmed.

Affirmed.

Mr. Justice Garrigues and Mr. Justice Scott concur.

No. 8909.

LYNCH v. UNION PACIFIC RAILROAD COMPANY.

1. RAILWAY COMPANY—*Responsibility for Freight after Completion of the Carriage.* A railway company which has completed the carriage of goods to destination is thereafter bound to no more than ordinary diligence in their care.
2. — *After Delivery.* A carload of vegetables had reached destination, and the consignee had paid the freight, accepted delivery, assumed the care, and having constant access to the car was daily removing the vegetables. He had thus continued for seven days. *Held* that the railway company was not liable for the subsequent freezing of the vegetables.

3. APPEAL AND ERROR—*Finding on Conflicting Evidence*, upon the issue on which the case was determined below, will not be disturbed.

Error to Denver District Court, Hon. George W. Allen, Judge.

Mr. EDWIN H. PARK, for plaintiff in error.

Messrs. HUGHES & DORSEY, Mr. JOHN Q. DIER, Mr. ROBERT L. STEARNS, for defendant in error.

Chief Justice Hill delivered the opinion of the court:

THE plaintiff in error seeks to recover damages for the destruction of a part of a car load of vegetables, alleged to have been frozen while in a car on the tracks of the defendant in error in Denver. It claims, while the contents of this car were still in the possession of the defendant, that it so negligently cared for the same, by removing without notice to the plaintiff the heating apparatus which the defendant had placed in said car upon its arrival in Denver to prevent the freezing of said vegetables, etc., and that upon account of such negligence they were frozen, etc. The defendant denied any negligence, and, among other defenses, plead delivery to plaintiff of the car and its contents, prior to the time of the freezing complained of, also that it had exercised ordinary care in its custody of the contents of the car, up to the time the plaintiff concedes it received it. Trial was to the court, which, upon conflicting testimony, found the issues in favor of the defendant.

The plaintiff admits that the defendant's liability in the way of an insurer as a common carrier had ceased, but contends that at the time the damage occurred, it was a bailee for hire and cites numerous authorities concerning the duties and liability of a common carrier as a warehouseman, as a bailee for hire, and as a gratuitous bailee. The issues were found generally in favor of the defendant. There is testimony to sustain its contention that this car, or its contents rather, was delivered to the plaintiff before the damage occurred to the vegetables; that it had ac-

cepted the delivery, had assumed the responsibility for its care, and also that before this freeze it had removed a large amount of the vegetables from the car to its place of business, etc. It admits that it had paid the freight, and unloaded a part of the car before the remainder was frozen. If the court's finding in defendant's favor was based on the strength of its testimony that delivery had been made, which is sufficient to sustain this conclusion, then the responsibility of the defendant for the safety of the goods had ceased prior to the time the damage occurred and the conclusion reached was correct.

In Vol. 2, Hutchison on Carriers (3rd ed.), Sec. 714, the rule is laid down that, after the carrier's liability as a carrier has ceased (which is conceded here) and it becomes a hired bailee, it is bound to take ordinary care of the goods, and if it suffers them to be damaged or lost for want of such ordinary care, it shall be liable; that when it has once become the bailee of the goods, its liability in that character will continue as long as the goods remain its custody. If the court was of opinion that there had been no delivery of the vegetables which were in the car at the time frozen, and that at that time the defendant was keeping them in its car as a bailee for hire, upon account of its charge for demurrage, then the foregoing rule is applicable, but when thus considered, we find sufficient testimony to sustain a finding that the defendant, under the circumstances disclosed, exercised ordinary care in its custody of that portion of the vegetables frozen until delivery. This was made an issue. The fact that they had frozen while in the car is not conclusive evidence of negligence upon the part of the defendant, especially when it was shown that the plaintiff had access to the car and was daily removing from it a portion of the shipment and thus continued for a period of seven days. As bailee, the defendant was not an insurer of the goods against freezing. This showing, though *prima facie* evidence of negligence, *Nutt v. Davidson*, 54 Colo. 586, 131 Pac. 390, 44 L. R. A. (N. S.) 1170, created as

against defendant's a conflict in the testimony which, if the case was disposed of on this issue, the court decided in favor of the defendant. There being testimony upon which such a finding can be sustained, the judgment will be affirmed.

Affirmed.

Mr. Justice White and Mr. Justice Teller concur.

No. 9352.

THOMAS ET AL. v. CITY AND COUNTY OF DENVER.

Error to Denver District Court.

Hon. John I. Mullins, Judge.

Messrs. HARRY C. RIDDLE, W. W. DALE, for plaintiffs in error.

Messrs. JAMES A. MARSH, WILLIAM R. KENNEY, for defendant in error.

Opinion per curiam.

The defendant in error brought this action to recover judgment for the amount of a promissory note, given by the plaintiffs in error in part payment for the material in certain buildings, which were to be wrecked and removed from what is now known as the Civic Center in the City of Denver. The answer admits the execution and delivery of the note, and alleges certain other facts as a defense to its payment. These were put in issue and upon trial to the court, on conflicting testimony, they were decided in favor of the city. In such circumstances, it is not the province of this court to disturb the finding.

Sponsel v. Schaeffer, 61 Colo. 576, 158 Pac. 617; *Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816; *Slack v. Anderson*, 60 Colo. 466, 154 Pac. 89; *Rogers v. Nevada Canal Co.*, 60 Colo. 59, 151 Pac. 923, Ann. Cas. 1917C 669; *Central Trust Co. v. Culver*, 58 Colo. 334, 145 Pac. 684.

The application for supersedeas will be denied and the judgment affirmed.

Supersedeas denied: *Judgment affirmed.*

Department three.

No. 9399.

BECKER v. EMERSON-BRANTINGHAM IMPLEMENT COMPANY.

*Error to Logan District Court.**Hon. H. P. Burke, Judge.*

Messrs. MCCONLEY & MCCONLEY, for plaintiff in Error.

Mr. FRANK L. GRANT, for defendant in error.

Opinion per curiam.

This action was brought by the plaintiff in error in the district court of Logan county to have set aside and held for naught, a judgment rendered against him in the district court of the City and County of Denver, upon a promissory note and to recover \$3,000.00, alleged damages growing out of the transaction in which the note was given. Upon trial to the court, the action was dismissed at the cost of the defendant.

Perceiving no prejudicial error, the application for supersedeas will be denied and the judgment affirmed.

Supersedeas denied: *Judgment affirmed.*

Department three.

No. 8463.

MCPHEE, ET AL. v. THE UNITED STATES OF AMERICA.

Error to Montrose District Court, Hon. Thomas J. Black, Judge.

Messrs. DINES, DINES & HOLME and Mr. K. B. TOWNSEND, for plaintiffs in error.

Mr. HARRY B. TEDROW Mr. FRANK HALL, Mr. JAMES B. ALEXANDER, Messrs. MORRIS & GRANT, Messrs. SMITH, BROCK & FERGUSON, Mr. R. F. ARMSTRONG, Mr. RAYMOND J. MCPHEE, Messrs. CATLIN & BLAKE, Messrs. SHERMAN & SHERMAN, for defendants in error.

Mr. Justice White delivered the opinion of the court:

Each party to this case is a party, either as Plaintiff in Error or Defendant in Error, to Case No. 8434, which has just been determined.

The controlling facts of the cases are identical and constituted but one case in the trial court. After judgment in this Court the cases were consolidated. The opinion in No. 8434 determines the questions in this case and the same orders there entered will be entered here.

Judgment affirmed in part and reversed in part.

Chief Justice Hill and Mr. Justice Bailey concurring.

No. 9400.

RIGGIO v. THE PEOPLE.

Error to Las Animas District Court, Hon. A. Watson McHendrie, Judge.

Mr. O. H. DASHER and Mr. DAVID M. RALSTON, for plaintiff in error.

Mr. LESLIE E. HUBBARD, Attorney General.

Mr. CHARLES ROACH and Mr. BERTRAM B. BESHOR, assistants for the people.

Per curiam.

This case comes before us upon an application for supersedeas, pending consideration of the writ of error. We have carefully considered the record and briefs and finding no probable error in the record, the application for a supersedeas is denied and the judgment of the district court is affirmed.

Judgment affirmed.

Per curiam.

HILL, C. J. and GARRIGUES, J. concur.

No. 8462.

WEIGELE v. THE UNITED STATES OF AMERICA.

Error to Montrose District Court, Hon. Thomas J. Black, Judge.

Messrs. ROGERS, ELLIS & JOHNSON and Mr. PERCY ROBINSON for plaintiff in error.

Mr. HARRY B. TEDROW, Mr. FRANK HALL, Mr. JAMES B. ALEXANDER, Messrs MORRIS & GRANT, Messrs. SMITH, BROCK & FERGUSON, Mr. R. F. ARMSTRONG, Messrs. DINES, DINES & HOLME, Mr. K. B. TOWNSEND, Messrs. SHERMAN & SHERMAN, for defendants in error.

Mr. Justice White delivered the opinion of the court.

Each party to this case is a party, either as plaintiff in error or defendant in error, to case No. 8434, which has just been determined.

The controlling facts of the cases are identical and constituted but one case in the trial court. After judgment in this Court the cases were consolidated. The opinion in No. 8434 determines the question in this case and the same orders there entered will be entered here.

Judgment affirmed in part and reversed in part.

Chief Justice Hill and Mr. Justice Bailey concurring.

No. 8466.

SHERWIN v. THE UNITED STATES OF AMERICA.

Error to Montrose District Court, Hon. Thomas J. Black, Judge.

Messrs. DINES, DINES & HOLME and Mr. K. B. TOWNSEND for plaintiff in error.

HARRY B. TEDROW, MORRIS & GRANT, R. F. ARMSTRONG, RAYMOND J. MCPHEE, CATLIN & BLAKE, SHERMAN & SHERMAN for defendants in error.

Mr. Justice White delivered the opinion of the court.

Each party to this case is a party, either as plaintiff in error or defendant in error, in McPhee v. United States case No. 8434, which has just been determined.

The controlling facts of the cases are identical and constituted but one case in the trial court. After judgment in this Court the cases were consolidated. The opinion in No. 8434 determines the questions in this case and the same orders there entered will be entered here.

Judgment affirmed in part and reversed in part.

Chief Justice Hill and Mr. Justice Bailey concurring.

No. 9092.

COLLARD v. HOHNSTEIN.

Error to Logan District Court, Hon. Haslett P. Burke, Judge.

Mr. W. L. HAYS, for plaintiff in error.

Messrs. MUNSON, KEATING & MUNSON, for defendant in error.

Mr. Justice Bailey delivered the opinion of the Court.

The only question involved in this case is substantially and in legal effect identical with that determined in I. R. Collard v. H. P. Hohnstein, 174 Pac. 596 handed down at this term of the Court. The opinion in that case is controlling here. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 8467.

OWEN v. THE UNITED STATES SUING FOR USE OF THE MONTROSE
HARDWARE COMPANY, ET AL.

Error to Montrose District Court, Black, Judge.

Affirmed in part on the authority of No. 8434.

Opinion by White J.

K. B. TOWNSENND, for plaintiff in error.

HARRY B. TEDROW, MORRIS & GRANT, SMITH, BROCK & FERGUSON,
RAYMOND J. MCPHEE, CATLIN & BLAKE, SHERMAN & SHERMAN for
defendants in error.

Mr. Justice White delivered the opinion of the court.

Each party to this case is a party, either as plaintiff in error or
defendant in error, to case No. 8434, which has just been determined.

The controlling facts of the cases are identical and constituted but
one case in the trial court. After judgment in this court the cases
were consolidated. The opinion in No. 8434 determines the questions
in this case and the same orders there entered will be entered here.

Judgment affirmed in part and reversed in part.

Chief Justice Hill and Mr. Justice Bailey concurring.

No. 8461.

THE UNITED STATES OF AMERICA v. MONTROSE HARDWARE COMPANY,
ET AL.

Affirmed on the authority of McPhee v. The United States, No.
8434.

Opinion by White, J.

Error to Montrose District Court, Black, Judge.

HARRY B. TEDROW, FRANK HALL, JAMES B. ALEXANDER for plain-
tiff in error.

SMITH, BROCK & FERGUSON, MORRIS & GRANT, ROGERS, ELLIS &
JOHNSON, DINES, DINES & HOLME, SHERMAN & SHERMAN, for defend-
ants in error.

Mr. Justice White delivered the opinion of the court.

Each party to this case is a party, either as plaintiff in error or
defendant in error, in McPhee v. United States No. 8434, which
has just been determined.

The controlling facts of the cases are identical, and constituted but

one case in the trial court. After judgment in this court the cases were consolidated. The opinion in No. 8434 determines the questions in this case and the same orders there entered will be entered here.

Judgment affirmed in part and reversed in part.

Chief Justice Hill and Mr. Justice Bailey concurring.

No. 9370.

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, v. KESTENBAUM.

Error to Denver District Court, Hon. John I. Mullins, Judge.

Judgment affirmed.

Mr. FRANK McLAUGHLIN and Mr. FRANK EXLINE, for plaintiff in error.

Messrs. HINDY, FRIEDMAN & BREWSTER, for defendant in error.

Per curiam.

An examination of the record and briefs in this case discloses no prejudicial error, and for such reason supersedeas is denied and the judgment of the trial court is affirmed.

Judgment affirmed.

Department.

Per curiam.

No. 8913.

DENVER TRAMWAY COMPANY v. LEWIS.

*Error to Denver District Court, Hon. John A. Perry, Judge.
Department.*

GERALD HUGHES, HOWARD S. ROBERTSON, W. G. TEMPLE, for plaintiff in error.

WILLIAM W. GARWOOD, OMAR E. GARWOOD, GEORGE O. MARRS, for defendant in error.

Opinion by Mr. Justice Teller.

This cause involves the same facts and questions of law as cause No. 8914,—*Denver Tramway Company v. Orbach*,—and was argued with the latter case. For the reasons given in the opinion in that case, the judgment in this case is affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice White concur.

September Term, 1918.

No. 8534.

ANTERO & LOST PARK RESERVOIR COMPANY v. OHLER ET AL.

WATER RIGHTS—APPROPRIATION—*Negligence in Completion of the Work.* The appropriator for several years failed to carry on its works for the diversion of the water and its application to beneficial uses. Its appropriation was dated from the resumption of activity.

Garrigues, J. Dissented upon the ground that the delays were excused by the magnitude and difficulties of the work, the death of one of the active parties, and the financial stringency attending the panic of 1893.

*Error to Park District Court, Hon. Charles Cavender,
Judge.*

En banc.

Mr. PAUL M. CLARK, Messrs. GOUDY & TWITCHELL and Mr. L. M. GODDARD, for plaintiff in error.

Mr. G. K. HARTENSTEIN, Mr. MILTON SMITH, Mr. CHARLES R. BROOK, Mr. W. H. FERGUSON and Mr. R. F. ARMSTRONG, for defendants in error.

Mr. GERALD HUGHES, Mr. CLAYTON C. DORSEY, Mr. CHARLES D. TODD, Mr. R. W. FLEMMING, Mr. T. J. LEFTWICH, Mr. L. R. TEMPLE, Mr. DELPH E. CARPENTER, Mr. CHARLES F. TEW, Mr. WALTER E. BLISS and Mr. L. R. RHODES, *amici curiae*.

Opinion by Mr. Justice Teller.

PLAINTIFF in error is the owner of the Antero Reservoir, located on the South Fork of the South Platte River, and the Lost Park Reservoir, located on Goose Creek, or Lost Park Creek, and duly filed its statement of claim in a proceeding to adjudicate water rights in Water District No. 23.

For the first named reservoir a priority was claimed to

the extent of two billion, five hundred and fifty-two million, six hundred and fifty-four thousand, nine hundred and eighty-six cubic feet, as of November 15, 1888, and one billion, one hundred and eighty-six million, five hundred and thirty-five thousand, eight hundred and nineteen cubic feet, by way of an enlargement, as of November, 1907; and for the other reservoir a priority was claimed to the extent of two billion cubic feet, as of January 1, 1891.

The referee found the claimant entitled to an appropriation, for the original construction, to the amount claimed, as of March 8, 1891, and, by way of enlargement, one billion, one hundred and seventy-four million, five hundred and two thousand, one hundred and eighty-two cubic feet, as of November 1, 1907, provided the claimant proceed with due diligence to complete the reservoir to the above named capacity.

He found that the Lost Park Reservoir was entitled to an appropriation of two billion cubic feet, as claimed, as of January 1, 1891.

Exceptions having been filed to the referee's report, the court made new findings, and gave to the Antero Reservoir an appropriation of three billion, seven hundred and twenty-seven million, one hundred and fifty-seven thousand, one hundred and sixty-eight cubic feet—its full capacity—as of October 8th, 1907. It gave to Lost Park Reservoir an appropriation of two billion cubic feet, as of date of October 3, 1907.

The cause is now here for review on error.

The substance of the several assignments of error is that the court erred in not adopting the findings of the referee, instead of making new findings.

The record contains a large quantity of evidence as to the beginning of work on the reservoir, and the prosecution of it. From this it appears that from 1891 to June, 1894, there was some actual construction work carried on; that later, for several years, the only work done was by way of keeping up the fences and buildings on the property,

and that from 1898 to the year 1907, when claimant purchased the property, it was rented, and no work done by way of construction. There is ample evidence to support the court's finding that the work had not been carried on with diligence from 1894 to 1907, and that the claimant had no right to an appropriation dated prior to 1907. Under these circumstances, to set aside the court's findings would be a violation of a well settled rule, and without justification.

The former opinion is withdrawn and the judgment affirmed.

Judgment affirmed.

Mr. Justice Garrigues and Mr. Justice Scott dissent.

GARRIGUES, J., *Dissenting*:

I can not agree with the majority opinion. All the evidence was taken before a referee, who made findings of fact and drafted a decree based thereon, as required by statute. The referee found that construction work was commenced by one Cyrus Richardson in 1891, who soon thereafter conveyed his holdings to the Highline Reservoir Company, of which he was president and general manager; that the company proceeded diligently with the work and there was expended some \$50,000.00 on the enterprise prior to 1899; that on account of Richardson's death in 1894, coupled with the great financial panic lasting several years, the construction force was reduced in 1894, but work continued without substantial interruption until 1899; that the altitude of the reservoirs in the mountains, with the attendant long winter seasons, made it impracticable to prosecute the work during the winter months; that some work was done after 1899, but active work of construction upon a large scale was not resumed after 1899 until 1907, when the present claimant took possession of and carried the enterprise to completion; that claimant's predecessors made diligent efforts to complete the enterprise, and the delay was due to the death of Richardson in 1894, and the great financial stringency following the panic of 1893; that

the work of construction was of great magnitude *and carried on with due diligence*, and there was no intention at any time of abandoning the enterprise.

The court made the same identical findings of fact; in other words, it adopted the referee's findings as its own, except it omitted therefrom the phrase I have italicized, "and carried on with due diligence," and found that construction work was suspended in 1899 (not 1894, as stated in the majority opinion), and not resumed until 1907. It made no affirmative finding of lack of diligence; it simply found that work was suspended from 1899 to 1907, and on this finding it denied claimant the right of relation.

The referee found the priorities should date by relation back to the inception of the work in 1891, and the only point in the case is whether the decree reported by the referee as to the dates of priorities should have been adopted by the court.

The court entered a decree denying claimant the right of relation, and it did so solely because it found work had been suspended from 1899 to 1907. The majority opinion states the court found that the work of construction had not been carried on with diligence from 1894 to 1907. The court made no such finding. It adopted the finding of the referee that work had been carried on with diligence from 1891 to 1899.

The majority opinion holds, "under these circumstances, to set aside the court's findings would be a violation of a well settled rule, and without justification." The rule is not given. Apparently it is so well settled that it need not be stated. The trial court did not see or hear a single witness on the stand, and under "a well settled rule" of this court is in no better position to judge of the evidence and its legal effect than a court of review. The evidence was taken by a referee, reduced to writing and filed in court as required by statute, and in this respect is in the nature of a deposition, of which we are in as good position to judge as the trial court and are the final judges. Its truthfulness is

not in dispute and there is no conflict in and no controversy over the date of commencement of work in 1891 and the good faith with which it was prosecuted. This is all conceded. Both the court and referee agreed and found that it was a work of unusual magnitude, surrounded with great difficulty and carried on with diligence until 1899; that there was always an honest endeavor and intention to complete the project, and the good faith and *bona fide* intention and endeavor of the various owners is not questioned by any one. Upon these matters the referee and court are in accord. The project was begun by Richardson in the interest, and on behalf of, the consumers of water under the Highline Canal for the purpose of supplementing their ditch rights for irrigation. These persons were farmers, limited in means, and the stringency following the panic of 1893 crippled and hindered them in the prosecution of the work. The construction was exceedingly difficult and on account of the inaccessibility in the mountains and the shortness of the season, the work was necessarily slow. During the cessation of active work, the property was in the custody of caretakers and the enterprise was never abandoned. It is a question of law whether the cessation of active work from 1899 to 1907 deprived claimant of the benefit of the doctrine of relation. It does not involve the credence to be given to conflicting evidence by a court seeing and hearing the witnesses on the stand. The question is whether, as a matter of law, claimant is entitled, under the evidence, to have the priorities date by relation from 1891, or has forfeited this right. Whether claimant is entitled to have extended to it this doctrine, or should be deprived of that valuable right is a question of law which it is clearly our duty to settle. Upon review, the question should be determined by this court. The finding of the lower court depriving claimant of the right of relation is not final or binding upon us, but is the very reason why claimant is entitled to bring the case here for review and have settled by the highest court whether or not it is entitled to the benefit of this doctrine.

I am authorized to state that Mr. Justice Scott concurs in this dissenting opinion.

Decided March 5, A. D. 1917. Rehearing denied December 2, A. D. 1918.

No. 8619.

FIRST NATIONAL BANK OF GREELEY v. PATTERSON ET AL.

1. **TAX COMMISSION—Increase in Valuation—Discrimination.** An increase in the valuation of certain properties made by the county assessor does not require an increase in other properties of the same taxpayer, made by the commission itself. To omit it is not a discrimination.
So of a failure to make increase in the valuations made by the assessor in other counties.
2. **Taxation—Due Process of Law.** Where the statute authorizes a taxing board or other agency, meeting at specified times and places, to increase or decrease by such rate per cent., or amount, the aggregate valuation of properties made by the local authorities for the purpose of taxation, as will place such property on the assessment roll at its full cash value, and requires such taxing board to complete its labors within specified dates, notice is afforded to all persons who may be affected by the action of such board; and a property owner who remains inactive until the work of the board is completed, and the tax laid, will not be heard to afterwards apply for a rebate.
3. — **Illegal Tax,** may be recovered from the county, under Rev. Stat. Secs. 5750.
Sec. 5 of c. 134, Laws 1913 does not take away the taxpayer's right of action. - Its effect is to take from the county commissioners the power to refund the tax, without the approval of the tax commission, or the judgment of some court of competent jurisdiction that the tax is illegal.
4. **NATIONAL BANK—Failing to file a list of its shareholders** with the county treasurer, as required by Rev. Stat. sec. 5754, is liable for the tax assessed upon its stock.

Error to Weld District Court, Hon. Neil F. Graham, Judge.

Mr. H. N. HAYNES, for plaintiff in error.

Mr. CHARLES F. TEW, Mr. WALTER E. BLISS and Hon. FRED FARRAR, attorney general, for defendants in error.

Statement of Facts.

THE First National Bank of Greeley, as trustee for the holders of the shares of its capital stock, sought to prevent the defendant, as County Treasurer of Weld County, from collecting a portion of the taxes assessed upon such stock for the year 1913. The State Tax Commission intervened in the cause and demurred to the complaint. The defendant also demurred thereto, and both demurrers were sustained. Thereupon the plaintiff, declining to plead further, the cause was dismissed.

In substance, the complaint sets forth that the plaintiff bank, on June 11, 1913, delivered to the County Treasurer, in accordance with the provisions of § 5756 R. S. 1908, a sworn statement of the true condition of the bank, showing that:

"Its capital stock at par was -----	\$100,000.00
Its accumulated surplus -----	100,000.00
Its undivided profits -----	38,895.56
Said three items added to its liabilities, viz.:	
Circulating notes -----	97,300.00
Deposits -----	736,242.54

The total of ----- \$1,072,438.10
was balanced by assets of plaintiff then appearing on its books as follows:

Loans and discounts -----	\$576,741.46
U. S. bonds (par) -----	100,000.00
Banking house -----	25,000.00
Other real estate -----	3,510.00
Bonds, warrants, etc. -----	165,463.14
Cash and due from banks -----	196,723.50
Redemption fund -----	5,000.00

A total of ----- \$1,072,438.10"

That in said list of assets of plaintiff its real estate, on which its banking house was constructed, was valued at approximately one-half its real value; that certain furniture, typewriters, etc., and choses in action were omitted from

said list, and certain of the items included in "loans and discounts" and "bonds, warrants, etc.," were valued greatly in excess of their real value; that such overvaluation exceeded any undervaluation of plaintiff's real estate and omission of the aforesaid items; that the capital stock of plaintiff consisted of 1,000 shares of the par value of \$100.00 each, and had no fixed or settled market value; that the assessor, in the discharge of his duty, placed a value of \$48,900 upon plaintiff's real estate; and upon all its personal property, or all of its shares of stock held by sundry individuals, exclusive of investment in real estate, \$190,100.00, or a total of \$239,000.00; that prior to the meeting of the Board of County Commissioners of the county, as a board of equalization in 1913, the County Assessor, pursuant to the statute, made and transmitted to the Colorado Tax Commission an abstract of the real and personal property of the county assessed by him, aggregating a total of \$37,214,710.00; that the assessment of other property, for said year, in the county, made by the Colorado Tax Commission, was \$16,474,530.00; that thereafter the Colorado Tax Commission determined that the assessed valuation of property in the county, made and transmitted to it by the assessor, was below the full cash value thereof by 63%, which it ordered to be added thereto, and transmitted the same to the State Board of Equalization; that thereafter on the 22d day of October, 1913, the State Board of Equalization approved the action of the State Tax Commission, and ordered said raise of 63% upon the valuation of the real and personal property of the county as returned in the assessor's abstract, to bring it to its full cash value, but made no increase upon the property therein assessed by the Tax Commission; that on October 22, 1913, the State Board of Equalization, in writing, notified the assessor of the county of its action in the premises, and directed him to correct his assessment roll for that year by adding thereto said increase; and on the same day a like notice and direction were served upon him by the State Tax Commission;

that thereafter the assessor complied with the order of the aforesaid state taxing agencies, and changed his assessment roll to comply therewith, and on or about the first day of March, 1914, delivered to the defendant County Treasurer the tax list, with warrant for collection, whereon appeared the final assessment against plaintiff's scheduled real property, \$79,710.00, and against "its' personal property, \$309,050.00"; that such assessment so extended was \$149,760.00 in excess of the full cash value of plaintiff's property, and that of its stockholders; that as a result thereof an excess tax was extended on the tax roll for said year against "the personal property of plaintiff, or rather its stock held by its several stockholders," of \$2,515.97; that the original assessments made by the assessor on other banks in Weld County were made upon the same basis as that upon plaintiff's bank, that is, "by assessing their real property according to his judgment, and extending on the assessment roll, as first prepared, as valuation of their personal property, the remainder, to make up full book value," and that the aforesaid raise by the state taxing agencies of 63% was applied to all such banks; that the assessors in other counties, in making up their original assessments, applied the same rule as applied by the assessor in Weld County, "in the original valuation of personal property of banks or of their shares," but the state taxing agencies did not make the same increase or raise therein as was made in Weld County. On the contrary, in some counties such agencies made an increase upon the assessment made by the assessor of 40%, in others 3%, etc., while in other counties no increase whatever was made, and thereby caused an excessive and unjust assessment of plaintiff's property over that of like property elsewhere in the state, in violation of § 3 of Article X of the State Constitution; that the shareholders of plaintiff, for whom in this behalf it acts as agent and trustee, pursuant to the requirements of § 5754 of the Rev. Stat. of 1908, will be deprived of rights defined and protected by § 3 of Article X of the Constitu-

tion of Colorado, and by § 5219 Rev. Stat. of the United States, and by §§ 5591, 5753 of the Colorado Rev. Stat. of 1908, and of their property, without due process of law, and of the equal protection of the law, in violation of § 1 of Article XIV of the Amendments to the Constitution of the United States; that on the 29th day of April, 1914, pursuant to § 5 of "An Act in Relation to Revenue," etc., approved May 1, 1913, "plaintiff as agent and trustee of all its stockholders filed" with the Board of County Commissioners of Weld County its petition for abatement and rebate of said \$2,515.97 of excessive tax, stating as grounds therefor, in substance, what has hereinbefore been alleged; that the assessor recommended to the Board of County Commissioners that the petition of plaintiff for the aforesaid abatement be allowed, and on the 4th day of May, 1914, the Board of County Commissioners "certified said petition with its approval thereof to the Colorado Tax Commission for its approval or disapproval"; that thereafter the Tax Commission returned said petition to the Board of County Commissioners with endorsement thereon of its disapproval; that plaintiff paid, in its own behalf, in full to the County Treasurer, the whole tax levied on its real estate for the year 1913, and as agent and trustee of its shareholders also paid to said treasurer the taxes for said year upon the value of its personal property as originally assessed by the County Assessor, "leaving as unpaid on the books of said County Treasurer \$2,515.97 as tax on plaintiff's personal property, or on its shares of stock, with interest on one-half thereof at statutory rate from May 1, 1914, and on the other half thereof from August 1, 1914," the payment and receipt being made and given without prejudice to the rights of either party in the premises; that thereafter on the 25th day of August, 1914, the County Treasurer threatened to distrain certain personal property of plaintiff, to enforce collection of the balance of the aforesaid claimed taxes, and plaintiff believes that unless restrained by injunctive order, the treasurer will proceed to

collect the same by distraint; that plaintiff, as a national bank, is made agent and trustee for the owners of its shares of stock, in the matter of payment of taxes, and required to withhold dividends to the extent of taxes justly due, and, therefore, "has no adequate remedy in the premises save in a court of equity, to the end that multiplicity of suits may be avoided," and prays for temporary and permanent injunction, and "such other, further and different relief as to the court may seem just and equitable in the premises."

The bank, as trustee for its shareholders, brings the cause here for review on error and contends:

"a. That by the trial court refusing it any relief, it was judicially denied the protection afforded by section 3, article X, of the Constitution of Colorado, to have taxes assessed, levied and collected upon a just valuation of all property, real and personal, and were thereby denied the equal protection of the laws guaranteed by section 1 of article XIV of Amendments to the United States Constitution.

b. That it was denied the rights guaranteed by said sections of said constitutions and by section 5219 of Revised Statutes of the United States in not having taxes imposed on it based on a uniform rule upon the same class of subjects, because the valuation of its property, and that of other banks in Weld County, was upon an entirely different basis from that of banks located elsewhere in the state subject to the same state levy.

c. That plaintiff in its complaint charges it had exhausted without avail every remedy afforded it of redress through administrative officers; it urges in argument it did seek administrative relief at the only time and in the only manner afforded it by statute, and that the veto by the Colorado Tax Commission of the recommendation in its favor by assessor and county commissioners precluded any possibility of aid except in the courts.

d. That by the dismissal of the complaint and by denying the motion for new trial, the trial court did not give plaintiff the statutory right it has under section 21 of the

Code of Civil Procedure to have judicial determination of plaintiff's liability to defendant, County Treasurer, * * * .

e. That irrespective of the action being justly treated as one at law under section 21 of the Code, plaintiff was also entitled upon the facts to ancillary injunctive relief, denial of which, coupled with dismissal of its action at its costs, was reversible error under the Federal Constitution and said Federal statute."

Mr. Justice White delivered the opinion of the court:

After a careful consideration of the complaint, the points relied upon for reversal, and contention of counsel, in support thereof, we are of the opinion that the judgment of the trial court was proper, and the plaintiff in error has not been deprived of either a constitutional or statutory right, or suffered any wrong of which it can justly complain. The injustice and discrimination, if any, arise wholly from an alleged overvaluation of property for taxation purposes, enforced by action of the State Tax Commission and the State Board of Equalization. No claim is made of actual fraud or intentional wrong. The alleged overvaluation was the result of a flat increase ordered by the State Tax Commission, and by the State Board of Equalization, upon the aggregate value of all the property within the county, originally assessed by the assessor, and imposed by the aforesaid central tax assessing agencies, in strict conformity with the provisions of section 31 of the Act of 1911, chap. 216, p. 623. *Colorado Tax Commission v. Pitcher*, 56 Colo. 343, 365, 367, 138 Pac. 509.

The fact that the Tax Commission raised the aggregate valuation of the property in the county originally assessed by the assessor, and did not raise the value of the property therein which was originally assessed by it, does not constitute discrimination. The Tax Commission was authorized by law "to bring the valuation of taxable property to the legislative standard of full cash value." In making the valuation upon the property that it was authorized to assess, in the first instance, and increasing the value of that

originally assessed by the assessor, it discharged this duty; and when the State Board of Equalization approved the assessments so made, the assessment of the property was finally fixed. Although the state taxing agencies did not make the same increase or raise upon the several aggregate valuations returned by the different assessors, in other counties, as they made in Weld County, it does not constitute a discrimination of which plaintiff in error is in a position to complain. It concedes that it was cognizant of, and satisfied with, the assessment made by the assessor. But the law also made it cognizant of the fact that such assessment was subject to change by superior governmental agencies who were required to meet at certain places, on certain days, and complete their labors within designated dates. With full knowledge of the respective powers of these several boards to make corrections in assessments and adjustments in equalization, essential to bring about a complete and equitable assessment of all property within the state, it remained inactive until long after the tax was laid, when it applied for an abatement or rebate of the tax. The aforesaid tribunals were open to plaintiff in error prior to the laying of the tax, but it refrained from seeking relief therein, and may not now complain. *Colorado Tax Commission v. Pitcher*, supra, 368, 375.

The case is unlike *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903. In that case the acts and agreements of some of the different assessing bodies brought the matter within the jurisdiction of equity, as clearly appears in the opinion, page 161. In fact, there were four different bodies, acting independently of each other, in regard to as many different classes of property in fixing the final valuation thereof for taxation purposes, and by agreement among some of them, certain classes of property were assessed at one-third of their actual value, other classes at six-tenths of their value, and still other classes at their true value. This, in substantial effect, constituted conspiracy and actual fraud, and there was no means of relief, as there is in this

state, through a supervisory board, with authority over all to finally fix values. The lack of such board is made an important factor in that case, page 159. Mere errors or excess in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by application to agencies specially invested with power to act in the premises, either before or after payment of taxes, do not call for a court of equity to interpose by injunction to stay collection of a tax. *Bent County v. Santa Fe, etc.*, 52 Colo. 609, 125 Pac. 528.

In this state we have a system of assessment of property for revenue purposes peculiarly sane and sound. The local authorities have supreme power to cause equality of valuation upon the property of individuals within the counties; a Tax Commission, and a State Board of Equalization, have like power to take the aggregate returns from the several counties, and if they find that a county has had its property assessed too low, in reference to the standard of full cash value, they may raise its valuation.

But apart from this, if the tax was not legally laid, plaintiff in error could, upon payment thereof, recover the same from the county under the provisions of § 5750 R. S. 1908. *Woodward v. Ellsworth*, 4 Colo. 580; *Hallett v. Arap. Co.*, 40 Colo. 308, 9 Pac. 678; *Bent County v. Santa Fe, etc.*, supra; *Singer S. M. Co. v. Benedict*, 229 U. S. 481, 57 L. Ed. 1288, 33 Sup. Ct. 942; *Union Pac. R. Co. v. Commissioners*, 217 Fed. 540, 133 C. C. A. 392.

The last case cited reached the United States Supreme Court (see *Union Pac. R. R. Co. v. Weld Co.*, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110), where that court, speaking of this section of our statute, said: "That the taxes were levied for state, school district, and town, as well as for county, purposes, is not material; for it is apparent from the Colorado statutes and decisions that the section covers broadly the whole of the tax that is found to have been erroneous or illegal, regardless of the purpose for which it was levied and placed on the county tax roll. And

it is also immaterial that the taxes were made a lien on the company's real property, for the lien would be effectually removed by paying them and suing to recover back the money."

The statute also eliminates any question of multiplicity of suits, should the plaintiff in error pay the tax exacted and thereafter be called upon by its shareholders to account for the same. It did not file with the County Treasurer for the year a list of its stockholders, and the number of shares held by each, as required by § 5754 R. S. 1908. By reason of this negligence, it became liable for the payment of the tax, and by express terms of the statute, subjected its lands to sale, and its moneys, goods and personal effects to distraint for the payment thereof. *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181. Therefore, in a single action at law under the statute, it could protect itself and its shareholders, for whom it stands as trustee in the premises. In *Union Pacific R. R. Co. v. Weld Co.*, *supra*, it was contended that by the fifth section of chap. 134, S. L. 1913, section 5750 R. S. 1908, *supra*, had been repealed, or so modified and changed that the taxpayer no longer had the right to sue for and recover from the county an erroneous or illegal tax paid. It was held that the question was not free from doubt, and as a ruling by that court on the question would neither settle it for the state court, nor be binding in an action to recover the tax if paid, equitable relief would be extended. So it becomes necessary to determine the effect of the new section on the old section. We are of the opinion that it does not substantially affect the continued existence of the right conferred upon the taxpayer to recover from the county an illegal or erroneous tax he has paid. It may be conceded that the new section prohibits any voluntary refunding of taxes by the County Board of Commissioners, save in instances having the approval of the State Tax Commission. But this in no sense takes away the right of the taxpayer given by the old statute to sue. The true meaning of § 5750 is to impose a liability upon the

county in favor of a taxpayer who pays an illegal or erroneous tax, and a corresponding duty upon the commissioners, as agents of such county, to refund the same. The effect of the new section in no wise removes that liability, or deprives the taxpayer of his right to maintain a suit therefor, but only takes away the right of the commissioners, without first obtaining the approval of the Tax Commission, to refund the tax until it is "found" by judgment of a court of competent jurisdiction that the tax is erroneous or illegal, establishing the liability of the county. In other words, without the approval of the Tax Commission, it may not be "found," except by judgment of a court, that the tax is illegal or erroneous.

We see nothing in the record which requires a court of equity to extend relief to plaintiff in error. All the Justices concur, but Chief Justice Hill and Mr. Justice Teller desire to have it stated that they concur in the conclusions only. Our former opinion is withdrawn and this substituted therefor. The conclusions in both are identical and the application for rehearing will, therefore, be denied, and the judgment affirmed. It is so ordered.

Decision *en banc*.

Decided May 7, A. D. 1917. Rehearing denied December 2, A. D. 1918.

No. 8943.

NATIONAL FUEL COMPANY v. McNULTY.

1. EVIDENCE—*Expert Testimony*. Action by one injured while driving a coal car in defendant's mine, the injury being attributed to the defective condition of the mine. *Held* that the opinions of one qualified to speak of the matter, as to whether the entry in which plaintiff was employed was a reasonably safe place, was properly received.

The true test as to the admissibility of expert testimony is not whether the matter in question is common or uncommon, nor whether many persons or few, have some knowledge of it, but whether the witness called as an expert has any peculiar knowledge or

experience which renders his opinion of aid to the court or jury in determining the question at issue. The case of *Smugler Union Company v. Broderick*, 25 Colo. 16, is not authority for the exclusion of expert testimony in the proper case.

2. TRIAL—*Fair Trial*. Defendant cannot be heard to complain that plaintiff was permitted to examine witnesses as to a matter into which he himself was permitted to go at length.

Error to Boulder District Court, Hon. Harry S. Class, Judge.

Mr. RALPH HARTZELL, for plaintiff in error.

Messrs. RINN & ARCHIBALD, Messrs. REED & STEELE, Mr. JOHN CAMPBELL, Mr. HORACE N. HAWKINS, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS is an action for damages on account of injuries sustained by plaintiff, Thomas McNulty, while employed in a coal mine operated by the defendant, The National Fuel Company. Damages were awarded in the sum of \$1,500.00, and the company, alleging error, brings the cause here for review.

Plaintiff was injured while working in the coal mine of the defendant as a mule driver, conveying coal cars from the mine rooms along an entry to the bottom of a shaft from which the coal was hauled to the surface. The negligence complained of is that the entry was insufficiently lighted; that the grade thereof was too steep; that the wooden sand rails along the track on the curve where plaintiff was injured were inadequate to sufficiently check the speed of the car while rounding the curve; that the frame of a door through which the track passed, and which it is averred occasioned the injury, was built too close to the rails to permit of the safe passage of a loaded car; and that no warning of these extra hazards of his employment had been given.

It appears that McNulty was an experienced driver, and as such had been employed for some time in the mine, but

had never before hauled cars in the entry in question. According to his testimony, he was riding on the front end of a loaded car, down the entry, toward the shaft, when, on rounding the curve, near the doorway in question, the car tipped on account of excessive speed caused by the steep grade, and in endeavoring to restore it to proper position on the rails, he leaned to the high side of the car, and was struck by the frame of the door, thrown from the car and injured. There were no witnesses to the accident. Defendant presented in evidence a report made by an officer of the company shortly after the accident, which was alleged to have been taken down verbatim from the statement of plaintiff. That this was done is denied, but as the sharp conflict in testimony concerning this matter was settled by the jury, we need give the subject no further consideration.

The errors chiefly relied upon by defendant are the admission of certain testimony as expert evidence; and also the admission of evidence as to other accidents in the mine. One witness was permitted to testify over objection in relation to conditions in the mine at the time and place of the accident, and was asked an hypothetical question as to his opinion upon whether, under the conditions disclosed by the evidence, the entry was a reasonably safe place to work. However, at the time the objection was made to this line of testimony, the objection did not go to the admission of such testimony because it was expert testimony, but because the witness had not qualified as an expert. It is now contended that the question involved matters within the knowledge of the average man, and that the answers thereto were nothing more than opinion evidence. The witness was exhaustively questioned by counsel for both plaintiff and defendant, and upon his whole testimony it appears that he was fully competent to testify as an expert.

In support of the contention that plaintiff attempted to prove by his witness matters within the common observation of the average man, defendant cites *The Smuggler*

Union Mining Company v. Broderick, 25 Colo. 16, 53 Pac. 169, 71 Am. St. 106. In that case it was held that after a witness testifies to what was the right, and what not the right, way to construct a stope in a metal mine, it is reversible error to permit other miners to state in answer to an hypothetical question, whether the locality in question was or was not a reasonably safe place in which to work. That decision is not an authority, however, for refusing admission to expert testimony in a proper case. In *U. S. Smelting Co. v. Parry*, 166 Fed. 407, 92 C. C. A. 159, 161, the court, in discussing the admission of expert testimony, said, at page 410:

"The matter next to be considered is the admission, over the defendant's objection, of testimony by a practical brick mason and builder of many years' experience to the effect that a scaffold constructed and supported like the one in question was not as safe as those usually provided in like situations, but was very dangerous, because the weight of a man upon the projecting end of one of the planks was sure to make it tip. The objection made was, not that the witness was not qualified as an expert, but that his opinion was elicited upon a matter which it was the province of the jury to decide, and which they were capable of deciding without such testimony. It is true that in trials by jury it is their province to determine the ultimate facts and that the general rule is that witnesses are permitted to testify to the primary facts within their knowledge, but not to their opinions. And it is also true that this has at times led to the statement that witnesses may not give their opinions upon the ultimate facts which the jury has to decide, because that would supplant their judgment and usurp their province. But such a statement is not to be taken literally. It but reflects the general rule, which is subject to important qualifications, and never was intended to close any reasonable avenue to the truth in the investigation of questions of fact. Besides, the tendency of modern decisions is not only to give as wide a scope as is reasonably possible

to the investigation of such questions, but also to accord to the trial judge a certain discretion in determining what testimony has a tendency to establish the ultimate facts; and to disturb his decisions admitting testimony of that character only when it plainly appears that the testimony had no legitimate bearing upon the questions at issue, and was calculated to prejudice the minds of the jurors. * * * The most important qualification of the general rule before stated is that which permits a witness possessed of special training, experience, or observation, in respect of the matter under investigation, to testify to his opinion when it will tend to aid the jury in reaching a correct conclusion; the true test being, not the total dependence of the jury upon such testimony, but their inability to judge for themselves as well as is the witness. A reference to adjudicated cases will show the extent of this qualification, its application in actual practice, and the discretion accorded to the trial judge in that regard."

Continuing, the court cites with approval from the following cases, among others: *Transportation Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477; where a witness was permitted to give his opinion as to the safety of a Chesapeake Bay tugboat to tow three boats abreast in a high wind; *Gila River R. R. Co. v. Lyon*, 203 U. S. 465, 51 L. Ed. 276, 27 Sup. Ct. 145, where railway employees were allowed to give their opinion as to the safety of a buffer at the end of a spur track; *Western Coal & Mining Co. v. Berberich*, 94 Fed. 329, 36 C. C. A. 364, where a miner was permitted to testify as to his opinion of the safety of a room in a coal mine; *Chicago Great Western Ry. Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239, where a locomotive engineer testified that a rough and uneven track had a tendency to loosen a coupling pin and so part a train. The opinion also quotes with approval from *Taylor v. Town of Monroe*, 43 Conn. 36, as follows:

"The true test of the admissibility of such testimony is not whether the subject-matter is common or uncommon,

or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue."

In *Henrietta Coal Company v. Campbell*, 211 Ill. 216, 71 N. E. 863, plaintiff, a mule driver in a coal mine, was crushed while driving a car along an entry of the mine. The court, in speaking to the question of the admissibility of certain testimony, said:

"Certain questions were asked expert miners as to whether, in their judgment, certain conditions, as to the roadway, rendered it safe or otherwise, and it is claimed this was error, as the subject was one within the common observation of all men. We can not say such was the case. The roadways and entries of a mine and their adaptability to the use intended are not matters of common knowledge and we perceive no error in admitting the character of evidence here objected to."

In *Wilson v. Harnette*, 32 Colo. 172, 75 Pac. 395, the general rule and the exception is set out as follows:

"The objection now made that it was a question for the determination of the jury, and not for the witnesses, is not well taken, for, although the general rule is, as stated by counsel: 'That no witness may give his opinion in answer to a question which invades the province of the jury to determine the ultimate facts in the case,' the exception that on questions of science or skill, or relating to some art or trade, persons instructed therein by study or experience may give their opinion, is universally recognized. In the case of *McGonigle v. Kane*, 20 Colo. 292, the court held that the opinions of men who, by study, observation or experience, have become expert with respect to matters not of common knowledge, may be given in evidence to the jury."

From the foregoing it appears that the admission of the testimony of the witness as an expert coal miner was not

error. In any event, the fact, as already indicated, that no objection was made at the trial as to the admission of this testimony because it was opinion evidence, is an additional reason for not disturbing the verdict upon that ground.

Other assignments of error chiefly relied upon were the admission of testimony in relation to the general condition of the mine, the condition of the particular entry where the accident occurred, and the happening of other accidents in the mine. Although considerable latitude was permitted counsel for plaintiff in cross-examination as to these several matters, it appears that the subject had been gone into at great length, over objection, on direct examination by the defense, and the defendant, therefore, can not now be heard to complain, it having made opportunity for the same by its examination of witnesses on these subjects in chief. There are numerous other assignments of error, which, upon full examination, we deem without merit.

Judgment affirmed.

Decision *en banc*.

Mr. Justice Teller dissents.

No. 8978.

ENGELBACH v. KELLOGG.

1. APPEAL AND ERROR—*Verdict*, upon conflicting evidence must be accepted.
2. — *Evidence*. The admission in evidence of a self-serving memorandum, made by the party succeeding below, and probably decisive of the issue, *held* error.

*Error to Denver District Court, Hon. John H. Denison,
Judge.*

Department.

Mr. O. N. HILTON, Mr. CAESAR A. ROBERTS, Mr. LESLIE M. ROBERTS, for plaintiff in error.

No appearance for defendant in error.

Opinion by Mr. Justice Teller.

THE defendant in error recovered a judgment against the plaintiff in error in an action for a commission for procuring a loan.

The plaintiff claimed that he had been employed by the defendant to procure a loan at five and one-half per cent interest, and had secured said loan, while the defendant claimed the loan was to be at five per cent interest, and hence he had declined to accept it.

It is urged that the judgment is not supported by the evidence, but as there was a conflict of evidence upon the main ground of controversy, the verdict of the jury must be accepted by this court.

It is further contended that the court erred in admitting in evidence a memorandum, made by the plaintiff, and a letter written by him to the defendant.

The memorandum does not appear to be admissible under any of the exceptions to the general rule that memoranda are not admissible in evidence. The original is preserved in the record, and is a mere scrawl, in lead pencil.

It bore upon the vital question in the case, i. e., the rate of interest which the loan was to draw, and, there being a direct conflict in the testimony of the parties, the only witnesses on that point, it is highly probable that it may have been decisive of the issue.

Its admission was error, for which reason the judgment is reversed. The former opinion is withdrawn.

Chief Justice Hill and Mr. Justice White concur.

Decided March 4, A. D., 1918. Judgment *reversed* on rehearing December 2, A. D., 1918.

No. 8711.

RIVERSIDE RESERVOIR AND LAND COMPANY v. BIJOU IRRIGATION DISTRICT, ET AL.

1. APPEAL AND ERROR—*Errors not Argued*, will not be considered.
2. — *Decree upon Conflicting Evidence*, will not be reviewed.
3. WATER RIGHTS—*Appropriation—Reasonable Diligence*. Reasonable diligence in the work of appropriation depends upon the facts of the particular case, the nature and condition of the region, the magnitude and difficulties of the work, the labor supply, and the length of the season in which work is practical. (Scott, J.)

*Error to Weld District Court, Hon. Robert G. Strong,
Judge.*

En banc.

Mr. WALTER E. BLISS, Mr. CHARLES F. TEW, for plaintiff in error.

Mr. ROBERT M. WORK, Mr. GEORGE C. TWOMBLY, for defendants in error.

Opinion by Mr. Justice Teller.

The plaintiff in error seeks to reverse a decree, entered in a proceeding to adjudicate water rights, upon the ground that the court erred in awarding, to it two priorities, with an interval of five years between them, instead of one for the total of two, and all as of the earlier date.

The first decree is for seven hundred million cubic feet, with priority as of April 1st, 1902, and the second is for one billion, eight hundred and five million cubic feet, of date of August 1st, 1907.

Defendant in error The Bijou Irrigation District is the principal owner of the Empire Reservoir, to which was awarded one billion, six hundred and forty-two million, six hundred and twenty-nine thousand, eight hundred and ninety cubic feet, with priority of date May 18th, 1905.

Defendant in error Painter is the owner of the Grand View Seepage Ditch, which was given four cubic feet of

water as of date of May 15th, 1907. The error assigned as to that part of the decree is not argued, and, therefore, will not be considered.

The principal attack on the decree is on the ground that it is not supported by the evidence.

It is contended that the Riverside Reservoir, with capacity to the aggregate of both the priorities awarded to it, was one single project, carried on with diligence from its inception to its completion, and not at one time a completed work, with a subsequent enlargement.

The record contains a mass of evidence as to the manner and the time of doing the work on the reservoir, the inlet and the outlet, as well as evidence by way of contracts concerning the water rights contemplated, and statements of the promoters of the project. This included evidence, both written and oral, of admissions by those who were promoting the project and managing the work that the Riverside Company's priority was to antedate that of the Empire Reservoir only to the extent of the former's capacity at that time, which was seven hundred million cubic feet.

From all this it might reasonably be concluded that the original intent was to construct a system of irrigation by the storage of water to the extent later decreed to it as the first appropriation; and that the subsequent work done on it was by way of enlargement.

This conclusion is fortified by the fact that the owners, between the dates of the two appropriations, transferred their activities wholly to the south side of the river, and built there the Empire Reservoir, receiving irrigation district bonds therefor.

The referee found that the last work done on the Riverside system was an enlargement, and not the completion of an incompleated system; and the court approved and confirmed such finding. There being a clear conflict of evidence on that point, we are not at liberty to reject the findings of the court. The judgment is therefore affirmed.

Chief Justice Hill not participating.

Mr. Justice Scott dissents.

Scott, J., *dissenting*.

I cannot agree with the conclusion of the majority of the court. I am unable to find any material conflict in the evidence, and find that the issue in the case is not one of fact, but of law. The court did not find and could not have found, the facts differing in any material degree from what appears in the following statement.

The question to be determined is whether or not under the conceded state of facts, The Riverside Reservoir and Land Company proceeded with such reasonable diligence in the prosecution of its enterprise and application of water to a beneficial use, as will entitle it to a single priority dating from the time the trial court fixed its first priority in the decree, now under consideration.

The proceeding is to review an adjudication of priority of water rights for storage as between The Riverside Reservoir & Land Company and the Bijou Irrigation District. In the briefs and for convenience here these appropriators will be designated as plaintiff and defendant respectively. Both divert water from the South Platte river at or near the same point on the stream. The headgate of the Riverside reservoir is located on the north bank and the Bijou headgate on the south bank of the river.

The claim of priority of the Riverside is that it has an inlet with capacity of 1,000 cubic feet per second of time leading to the reservoir, a distance of about twelve miles. That the reservoir has a total storage capacity which may be drawn off through the outlet, of 2,860,000 cubic feet, with three outlet tubes of a total capacity of 1,500 cubic feet per second; that the lands irrigable by means of the several outlets are approximately 150,000 acres. The date of appropriation is claimed as of October 1st, 1895. Priority is claimed for 1,000 cubic feet of water per second of time, to the extent of an annual storage of 2,505,000,000 cubic feet.

The Bijou Irrigation District claims a priority for the Empire reservoir, as of date of November 1st, 1901, to the extent of 1,642,629,890 cubic feet. The trial court awarded priorities to these contending systems as follows: 1. Riverside Reservoir, April 1st, 1902, 700,000,000 cubic feet; 2. Empire Reservoir, May 1st, 1905, 1,642,629,890 cubic feet; 3. Riverside Reservoir, Aug. 1st, 1907, 1,805,000,000 cubic feet.

It will be seen that both were awarded the entire capacity claimed, but that the priority of the Riverside, under its first decreed priority, April 1st, 1902, was limited to 700,000,000 cubic feet, and that the Empire Reservoir was awarded its full capacity claimed, as of an intervening date between the first and second awards to Riverside.

There is no question raised as to the date of the priority or capacity awarded to the Empire reservoir, owned by the Bijou District. The contention of Riverside is that its entire award should have been made as of priority at least as early as April, 1902, and that it is entitled to the one total and indivisible award, antedating the priority of the Empire reservoir, for the reason claimed that it prosecuted its construction with due diligence to final completion with its claimed capacity of 2,505,000 cubic feet with the beneficial use to the lands supplied by means thereof.

The Riverside company, at the time of the filing of its statement of claim, had constructed and was maintaining its system as therein claimed, with an inlet of at least eleven miles in length, and a capacity of from 750 to 800 cubic feet per second of time, with a reservoir well constructed, with a capacity of at least 2,505,000,000 cubic feet, the water rights thereof disposed of, with one outlet supply ditch of about one hundred miles in length, in addition to other outlet supply ditches and that the cost of the system was approximately one million dollars.

The only question is, was the system from its inception constructed with such diligence, and continuity of acts and purpose as to entitle it to a single priority, and as an en-

tirety, antedating that awarded to the Empire reservoir. That the conception and purpose of the promoters from the beginning was to construct such an irrigation system, and in substantial conformity with that now completed and in operation, very clearly appears.

Mr. D. A. Camfield in every step was the directing and controlling force, whether acting as an individual, or as the president and manager of succeeding corporations, from the commencement to the end. He seems to have conceived the undertaking, to have financed it, and to have directed the construction to the point of completion.

On January 27th, 1896, in conjunction with George H. West he filed map and statement pertaining to the Sanborn, now Riverside, and other reservoirs, in which it was claimed that work commenced by survey on one of these, Pawnee Pass Reservoir, May 11th, 1895, and that the statement was made as amendatory and supplemental to a former survey.

On July 1st, 1896, these same persons in connection with one Walker, filed another map and statement of the Pawnee Pass reservoir systems, showing extension of the system and Sanborn or Riverside reservoir, in substantial conformity with its present location, together with other ditches, and wherein it was recited that the statement and survey was supplemental to that filed on May 11th, 1895, and declaring the proposed available storage capacity for the Sanborn, now Riverside, reservoir, to be 3,060,525,600 cubic feet.

Afterward these rights were transferred to a corporation organized for the purpose, and named the South Platte Land, Reservoir and Irrigation Company. This company received official notice from the Department of the Interior, dated April 16th, 1898, of approval of its application for right of way over government lands, for the construction of Sanborn, now Riverside Reservoir, of the capacity and under the plans above suggested.

Again, map and statement for this reservoir was filed on the 9th day of July, 1903, showing the Riverside reservoir to be located as described in former maps and statements, and among other things, declaring:

“(a) Owner is South Platte Company.

“(b) Name is Riverside Reservoir, formerly Sanborn Draw.

“(c) Description of reservoir, inlet, capacity as 3,060,-525,600 cubic feet, and inlet twelve miles long with 700 feet capacity intake.

“(d) Work commenced February 1st, 1898.”

It will be seen that at this time the property rights had been then transferred to a new corporation called The South Platte Company. It will also be seen that from these repeated acts and statements the purpose and plan were the same, and substantially as now completed, from the time of the first survey, May 11th, 1895, to the time of the filing of the map and statement of July 9th, 1903, nearly two years prior to date of priority awarded by the court to the Empire reservoir.

It appears that the entire plan included the construction of a chain of reservoirs, with necessary ditches.

The efforts of the Riverside appropriators and the work done up to and including the year 1903, is best stated in the undisputed testimony of Mr. Canfield in substance as follows:

“I think Mr. George H. West and myself commenced survey of Riverside and Jackson Lake reservoirs in 1895, and I was personally engaged on the survey. The inlet gate of reservoir is about a mile further up the river than where we surveyed it at that time.

Q. Describe how the line of ditches that were to fill this reservoir then were located by you? A Starting from the point where the old Riverside ditch was and following that line down to the present line and on into the Riverside Reservoir and then taking it out at or near the present outlet of the Riverside Reservoir and then extending on

northeast about fifteen miles and there emptying into Jackson Lake Reservoir for the Jackson Lake feeder and from thence on, extending on above Jackson Lake through the narrows and on to the Wild Cat reservoir inlet and feeder of Wild Cat reservoir.

"We then also made a survey looking toward the construction of the reservoir called Pawnee Pass Reservoir, which was on the same line of survey over in Pawnee Basin, and we then filed statements declaring our intentions to make appropriations for these reservoirs. The inlets to all of said reservoirs as proposed started about a mile further up the river and entered the present line of inlet about a half mile below the present head of the inlet and traveled approximately the same line located to the Riverside Reservoir as is now constructed, and we called the Riverside, the Sanborn Draw Reservoir.

"While making those surveys I traveled over every foot of the ground and became acquainted with the topography of the country.

"I had to do with the construction work and superintending of the Jackson Lake Reservoir, and held the position of Vice President and General Manager and in fact attended to the entire financial part and superintending of construction of the Sanborn Draw (Riverside) and Jackson Lake Reservoirs. I made all arrangements for the funds with which to do the work and engaged the laborers and contractors, and made all contracts and signed them.

"There were two filings made for Jackson Lake, this original filing and one later, I should judge in 1903, with a separate and independent inlet, which inlet was really built for Jackson Lake and the first one surveyed was the inlet to the Riverside and is the inlet direct from the South Platte River to the Riverside and the only one used for the Riverside. When we made said survey for the Riverside we determined the line and I think for the first five miles there was a fall of 2.12 feet per mile and from there 5 feet per mile for about three miles and the balance of the way 15

feet per mile. I have had considerable experience in construction of ditches and am acquainted with the method of construction known as erosion by plowing the ditch and running the water over it, which method we have used with the Riverside and the Bijou. This is the plan we contemplated at the time we located the Riverside and began the work and this plan of construction has been followed throughout the construction. The water we have run through this inlet for 6 or 7 years was for purpose of construction as well as for use. After we had made the surveys above mentioned for the Jackson Lake, Riverside and Wild Cat Reservoirs we formed The South Platte Land, Reservoir & Irrigation Company (herein termed South Platte Co.), for the purpose of constructing said reservoirs and I became vice president and general manager, and the company became owner of the appropriation and claims for the reservoirs as well as for the Bijou ditch which is on the south side of the river; since which time I have been actively engaged in the work of promotion and construction of said works and followed no other business.

"After the Riverside inlet enters the hills of the South Platte bottom it follows a rough sandy valley to the Riverside Reservoir and if the water escaped from the inlet ditch, after it passed what is known as the Benton Fills and below where the ditch enters the hills, it would run into the Riverside Reservoir. At the time we made our filings there was no dam in the river at the intake of the Riverside inlet, but there was a small ditch called the Riverside ditch and it was our purpose to enlarge that and run on the present line; and we did enlarge said ditch and did some work on it in June, 1897.

"These are large reservoirs and their construction required a large amount of money. The fill of the Riverside Reservoir is four and a half miles, and that of Jackson Lake about three and a half miles in length. We filed a change of the point of location of the head-gate of the inlet ditch to Riverside which made the new point about a mile further

down the stream. This intake ditch required a dam in the river and we constructed a temporary one of sacks and sand. We commenced construction work on the Riverside inlet as it is now located from the river to the reservoir in 1897. We did not commence work at the head of the ditch, but further down and had not at this time commenced work on the outlet of Jackson Lake.

"We worked continuously on either survey or trying to finance this project in '98, '99, 1900 and 1901, and I think it was in 1902 we commenced excavation work. The first contract in 1897 was let to Flemming Bros., who did three miles of work, but did not commence at the head-gate. The next contract was let to Baxter Bros., and they commenced work farther up the river. The Fleming Bros.' work commenced about two miles below the head-gate. In 1902, the work was let to J. A. Baxter, who was a ditch construction contractor, who sublet quite a lot to other parties, and I think he had about 50 or 60 teams working. Baxter did the work at the Benton fills and his work caused the inlet ditch to enter the hills below the Benton fills, which conducted the water to the valley through which it flowed to Riverside reservoir and after the ditch entered this valley about 90 or 95 per cent of it was constructed by plowing and using riprap on the lower side of the valley.

"Mr. Bradbury had the contract in 1903, for the entire length of the ditch below the point above mentioned where the ditch entered the hills and he constructed the ditch by putting in three fills and then making a small ditch the balance of the way in places where it was needed and that ditch will now carry from 800 to 1,000 feet and has been made by plowing and erosion.

"There were three depressions at lower end of the Benton Fill commonly called the Benton Lakes, the largest one was called the Benton Lake and at the deepest place it was about 20 feet in depth and originally covered 400 acres of land and on account of the ditch cutting down, the lake is practically drawn off, very little left. In 1903, after the

work had been done by Flemming, Baxter, Bradbury and others, the water was run through the Riverside inlet from the South Platte river to the reservoir and the first water was run by Mr. Bradbury's foreman, whose name I cannot remember, and I believe the water reached the Riverside Reservoir the first of December, 1903. I think it took about three weeks for the water to reach the reservoir, but now since the ditch is completed it takes about two or three days for the water from the river to reach the upper end of the reservoir which is about 11 miles from the river. I think approximately a mile and a half from the place where the water enters the reservoir to the place of discharge from the reservoir. Sanborn Draw or the Riverside Reservoir, was a natural basin and I have seen water in 1888, '89 and '90 stand in there for two or three years at a time.

"Baxter worked in 1902, and if my memory serves me, Bradbury commenced early in 1903, Bradbury and his subs must have had 350 teams. Prior to that time we have been engaged in letting contracts and getting funds to prosecute this project and also Jackson Lake, which was practically all one system. When Bradbury commenced his work in 1902 or '03 we had not filed on the inlet to Jackson Lake and I think Jackson Lake was commenced about that time. I believe work was done on Riverside first. When Bradbury took his contract he did work on the construction of the embankment to retain water in the site of the reservoir, and his subcontractors did work preceding the time that he did, Mr. Knowlton did work there on the ditch.

"I was also engaged in the financing, management and construction of Jackson Lake and inlet. Work was performed on the Jackson Lake inlet previous to Bradbury doing work on the Riverside. As near as I can remember work was commenced on the inlet to Jackson Lake somewhere in 1902, and the work on the two systems prosecuted together. Bradbury did not complete the embankments

on the Riverside Reservoir. We contemplated constructing the Riverside to something over 3,000,000,000 cubic feet and we prosecuted the work as far as we could with our funds.

"In 1897 I spent six months in New York and the East and in the summer of 1898 I spent four months and a half and we consummated arrangements three different times as far as we were concerned, but the money was not put up. We were constantly engaged in trying to raise money during all of this time for the Riverside, Jackson Lake and Bijou.

"We agreed to pay Bradbury \$50,000 but he drew out something over \$60,000, and we paid the difference in water rights. During this time of construction work, we spent the money as fast as we could obtain it and sometimes a good deal faster and paid for it when we could.

"It was not the intention of our company to limit the Riverside Reservoir in size by the amount of work done by Bradbury in 1903, but it was our intention to build it something over 3,000,000,000 and have the embankment riprapped, and Mr. Bradbury was experimenting on what was the best kind of riprapping. Bradbury did not construct the embankment over the entire four miles and a half, as it is now constructed and did not build it up to the present height at any place. When Bradbury left, the reservoir was not in condition to deliver water to the river. Kingsbury Bros. did most of the work on the outlet from reservoir to river and I think the work was done on this outlet in 1904, and '05. Up to this time, that is 1905, no work had been done on the outlet from Riverside toward Jackson Lake Reservoir or toward Wild Cat.

"Frank Baker, of Fort Morgan, took a contract and constructed a permanent dam at the headgate of Riverside inlet. This is a pile dam. Our company authorized the expenditure of some \$4,500 to \$4,800 for the construction of the dam, which is still there and answers the purpose of diverting the water into the inlet ditch. Ever since Brad-

bury left and up until the present time work has been going on on the inlet ditch by the use of teams and running water."

This testimony is corroborated by other witnesses as to work and labor performed for the years 1902 to 1908, inclusive. There is no conflict in the testimony concerning plaintiff's efforts in the matter of construction and development. Actual work of construction on the inlet in 1897 continued to some extent each year thereafter. This work was generally by what is termed erosion, that is to say by plowing the soil to be excavated and thereafter turning the water in the excavation and washing the loose soil away and into basins or depressions along the line of ditch. On the 19th day of May, 1904, soon after water was turned into the basin which forms the reservoir, the plaintiff company entered into a contract with one Bradbury for the construction of Riverside reservoir, including all its inlet and outlet ditches to a capacity of 3,000,000,000 cubic feet. Bradbury began the construction of the reservoir banks in that year and under a subsequent contract enlarged the inlet for a distance of three or four miles. It also appears that Bradbury, during this period; did extensive work on the outlets.

Bradbury under his contract of 1904, constructed the banks of the reservoir so that after final filling it contained approximately 700,000,000 cubic feet of water. The outlets, or at least the one to the South Platte river was not completed until 1905, and water turned out in 1906, for use in irrigation.

Under a contract with one Smiley in 1907, and completed by DeRemer and Olsen, the line of embankment was raised around the reservoir, a distance of about four and one-half miles, this including riprapping, was completed so that the reservoir was completed to its present capacity of 2,505,000,000 cubic feet in 1908. During this period also, the inlet was greatly enlarged and its banks riprapped.

Then without dispute, from the beginning of actual

construction which the court fixed as of April, 1902, the plaintiff and its grantors up to 1908, had constructed and placed in actual operation at least one of the most extensive irrigation systems within the state. There appears to have been no intervening year between these dates when there was not a vast amount of construction work performed on some one or all branches of the system, the diversion dam, the inlet, the reservoir proper, or the outlets and ditch extensions, which now supply a vast territory for irrigation.

There appears to be two contentions upon which defendant relies to sustain the judgment of the court allotting a divisible priority in the case of the Riverside reservoir. The first is that the reservoir at the time it was built to the extent of a capacity of 700,000,000 cubic feet, was a completed reservoir and system, and that there was prior to July 1st, 1907, no intention on the part of the owners of the Riverside reservoir to construct said reservoir to any larger capacity.

The second contention is that prior to the making of a contract with the Riverside Irrigation District, for the sale of certain water rights, persons who were at the time directors of the plaintiff company, made certain representations or promises to other persons who were about to organize said irrigation district, to the effect that the Empire reservoir would be entitled to a priority as against the Riverside, in excess of 700,000,000 feet.

To hold that it was not the intention of the promoters or owners of the Riverside Reservoir, at any time from its inception to the time of its completion, to construct such reservoir above a capacity of 700,000,000 cubic feet or to any capacity less than it now has, is so manifestly against the evidence as to forbid any such conclusion.

The very first survey statement and map, every subsequent statement and map, the application to and approval by the Department of the Interior, contracts for construction, construction in itself, the undisputed testimony of those connected with the enterprise, from the beginning to

completion, are in absolute agreement as to the purpose and intent to make the capacity not less than as now completed. As against this, there is only the testimony of witnesses to the effect that it appeared to be completed, coupled with the fact of cessation of work for a time on the reservoir banks, but not on the inlet and outlets, which, at least during a part of such time, were being constructed and enlarged sufficiently to supply and distribute the present capacity.

If we are to concede all this testimony to be true, it cannot weigh as against, nor is it in conflict with the uncontradicted evidence showing good faith and reasonable diligence. Otherwise, by reason of the very nature and character of the undertaking, there can be no safety for investments in legitimate irrigation projects, so necessary and vital to our material public and private interests.

Further, all testimony is in agreement that by reason of the loose and sandy character of the soil, riprapping of the reservoir was essential to its stability and sufficiency, and the testimony is in agreement, further, that the banks were not riprapped while the reservoir stood at the capacity of 700,000,000 cubic feet, and it is clear that there was no intention so to do. But when the structure was to be completed, the contract provided for such riprapping, and it was so completed.

As a further contention, it appears that each water right in the reservoir was fixed at one million cubic feet, from the first sale and at all times. In May, 1907, the Riverside Irrigation District was organized for the purpose, and entered into a contract of purchase with plaintiff's grantor. The Riverside Reservoir & Land Company, whereby the latter sold 1201 water rights in the Riverside reservoir to the irrigation district, for the sum of \$717,500.00 in bonds of the district, and in this manner the system was finally financed to its completion, with capacity of 2,505 water rights of one million cubic feet each. But just how this may tend to prove a prior intent not to construct be-

yond the then capacity of 700,000,000 cubic feet is not made clear.

As to the second contention it appears that the South Platte company, or what is termed the parent company, was the owner at one time of the three portions of the system then existing, The Bijou, The Jackson and the Riverside. The Bijou District was organized and purchased that system in 1900. The Jackson Lake & Reservoir Company was organized and took over the Jackson Lake system in 1905, and the Riverside Reservoir & Land Company took over the Riverside system in 1904. Substantially the same people were at the time the stockholders in the three corporations.

Judge McCreary, testifying for the plaintiff that there was no agreement as to priority at the time of the sale to the Bijou Company, says:

"At the time we were negotiating for sale of Bijou ditch and built Empire there was some talk by W. B. Chapman, A. D. Bennett, John Odell, P. W. Putnam and John T. Warren in which they asked for a stipulation that the Riverside had a capacity of something like 700,000,000 cubic feet and was to be built no larger and that the Empire reservoir when completed would have a priority junior to the 700,000,000 or thereabouts and senior to any other claims pertinent to that reservoir and there is nothing in any contracts to show that any such contract was made and there was nothing verbal or written in the way of a contract to that effect. I remember these people discussed that subject and wanted to get that kind of a concession and I said to some of them at that time that the ultimate settlement of these priorities and their relative standing would be in the hands of the courts and they could be determined on evidence when the time came."

It is not contended that there ever was a contract, verbal or written, between the Riverside corporation that sold, and the Bijou District that purchased the water rights, concerning any such claim of priority by the latter to a

priority as against Riverside in excess of 700,000,000 cubic feet.

An examination of the form of water right contracts for rights sold prior to the completion of the reservoir to a capacity of 700,000,000 cubic feet and prior to the sale of the 1,201 additional rights to be taken from the increased capacity to 2,505 million cubic feet, discloses no statement or suggestion that the reservoir was to be limited to 700,000,000 cubic feet.

A. D. Bennett, for the defendant, testified that at the time of the sale to the Bijou district there was a verbal agreement or understanding that the Bijou company was to take priority over Riverside in excess of 700,000,000 cubic feet. P. W. Putnam says that it was understood by us that Empire would have such priority. Mr. W. B. Chapman testified:

"Am acquainted with the Empire reservoir and Riverside reservoir, prior to organization of Bijou district, contention arose between the district and the Riverside company or Camfield, McCreery, Shields and others composing the company and we had lots of talk about the reservoir and litigation arose. They had done some work on the Riverside, got it up I believe to 700,000,000 or partly done to that height. The people that owned the Empire were the same that claimed the Riverside and the district entered into negotiations with Riverside officers relative to settlement of respective rights of the reservoirs. After we had agreed to buy the Bijou we didn't think they would build any larger than 700,000,000 on the Riverside. We bought the Bijou ditch and contracted with them to build the Empire,—buy the Bijou ditch all but 190 rights and were to pay \$737,000 in bonds I believe, and when this contention arose and interest in the Empire was claimed by the district and P. W. Putnam, B. B. Putnam, L. L. Stimson, John T. Warren and Charles F. Tew and it was my understanding that in the settlement of these claims a representation was made by the owners of the Riverside that if the dis-

trict would buy the ditch stock and give them a contract to construct the Empire reservoir and intake and enlarge the Bijou ditch and pay John T. Warren and Charles F. Tew \$20,000 for their alleged interest in Empire, the claims or appropriation should relinquish the first 700,000,000 in the Riverside and the Empire should take preference of any other water over the Riverside."

It will be seen that this all refers to negotiations and conversations between individuals prior even to the organization of the Bijou District, and not to any agreement or dealings with it.

There are other witnesses who testify to similar conversations and understandings had with individual officers of the Riverside Company, but no one testifies that there was any such agreement between the Riverside and Bijou corporations.

The corporation owner of an irrigation system is held under our law to be a trustee for individual consumers; and talks, understandings or even promises of individual officers may not bind the corporation as against the rights of the consumer whom the corporation represents. It is clear that there was no conveyance nor agreement to convey on the part of the Riverside corporation as such.

It is the settled rule of law that while appropriations ripen into a right only when the water is actually applied to the beneficial use, and although the appropriation is not deemed complete until the actual diversion or use of the water, yet if such work be prosecuted with reasonable diligence, such right relates to the time when the first step was taken to secure it, but such due diligence must be continued from the inception to completion.

What is a reasonable time and what constitutes reasonable diligence depends largely on the facts of the particular case. In this must be considered chiefly the physical circumstances of the locality, the nature and condition of the region to be traversed, its accessibility, the length of the season in which work is practicable, labor supply, the mag-

nitude of the enterprise and the difficulties of construction. 40 Cyc. 712.

In this instance the system was constructed through a new and practically undeveloped and unsettled country. The uneven and loose sandy condition of the soil naturally tended to make progress slow, even under the most favorable circumstances otherwise.

The good faith undertaking of such an enterprise with reasonable hope of a successful termination under all the circumstances of this case was an exhibition of confidence and courage. Certainly the proof of want of reasonable diligence in the absence of bad faith should be clear and convincing in a case of this kind. Very early this court laid down the rule governing in such cases which it has consistently followed, when it announced in *Highland Ditch Co. v. Muffor*, 5 Colo. 325, that:

"That to constitute due diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertaking as is usual with those in like enterprises. Such assiduity as shows a bona fide intention to complete the undertaking within a reasonable time."

Water Supply & Storage Co. v. Larimer & Weld, 24 Colo. 322; *Conley v. Dyer*, 43 Colo. 22, 51 Pac. 496, 46 L. R. A. 322; *Colo. Land & Water Co. v. Rocky Ford Canal, Reservoir, etc. Co.*, 3 Colo. App. 545, 34 Pac. 580; *Taughenbaum v. Clark*, 6 Colo. App. 235, 40 Pac. 153; *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. App. 130, 40 Pac. 1066.

These cases clearly justify the conclusion that under the facts and circumstances of this case, there was reasonable diligence and good faith on the part of the Riverside Company, and that under the doctrine of relation that company is entitled to have the priority for its reservoir in its entirety as claimed, decreed to be 2,505,000,000 cubic feet, and as of date as early at least as fixed by the trial court.

This view seems to be well sustained by the great weight of judicial authority. It is clear that no contract or agreement was made by the plaintiff corporation with the defendant district, whereby the former waived or agreed to convey its right of priority to the defendant, nor do we find evidence of any such acts or conduct as will constitute an estoppel upon the part of the plaintiff from claiming and asserting its priority of appropriation as against the defendant.

I am authorized to say that Mr. Justice Garrigues concurs in this opinion.

Decided May 6 A. D., 1918. Rehearing denied December 2, A. D. 1918.

No. 8756.

TROWELL LAND AND IRRIGATION COMPANY v. BIJOU
IRRIGATION DISTRICT, ET AL.

1. WATER RIGHTS—*Adjudication of Priorities—Special Proceeding.*

An appropriator who is diligently proceeding to complete an inchoate right to the use of water is not required to assert his claim in a special proceeding, instituted by another appropriator solely to adjudicate his own right.

2. — *Conditional Decree*, awarding to the appropriator a specified volume of water, without prejudice to a larger appropriation, upon evidence of the future application of the increased volume to beneficial uses, within a reasonable time, approved. The right of the appropriator to the increased volume upon compliance with the decree relates to the beginning of his work.

3. — *Delays in the Application of the Water to Beneficial Uses.* Where the junior appropriator asserts that by delays in the completion of his works, the senior appropriator has lost his priority he must show that his own appropriation was initiated, and work commenced thereunder, during such delays.

4. — *Relation.* Where even after inexcusable delay in the work of applying the water to beneficial use the appropriator resumes work before the right of any third person has intervened, and proceeds diligently to its completion and use, his right relates to the initiation of his appropriation.

5. — *Limitations.* The Limitations prescribed by Rev. Stat.

secs. 3313, 3338 apply only against a final and absolute decree.

6. — *Abandonment—Effect.* An abandoned ditch which collects seepage and conveys it to the stream is regarded as a natural water course.
7. — *Officers of the Water Service—Jurisdiction to Control.* The District Court of one county has no jurisdiction to control the officers of the water service in the administration of a ditch located in another county, when the ascertainment and determination of the priorities therein is vested by statute in the District Court of such other county.
8. — *Seepage Water.* The doctrine of *Comstock v. Ramsey*, 55 Colo. 244, is not confined to the case where the seepage in question has not yet reached the stream. It extends to escaped water which will naturally, and in the course of time reach the stream from which it was diverted.
9. — *Reservoirs—Right of Owner as to Seepage therefrom.* The owner of a reservoir may construct a ditch and drain the lands which the seepage from his works has injured but this confers no right to the seepage, if the water so collected may naturally return to the stream.

And the owner of a reservoir who contributes to the construction of a ditch for the collection of his seepage, merely to avoid an action by the owner of lands damaged thereby acquires no right in the seepage so collected.

Error to Weld District Court, Hon. Robert G. Strong, Judge.

Messrs. GOUDY, TWITCHELL & BURKHARDT, Mr. H. R. KAUS, for plaintiff in error.

Mr. JAMES W. MCCREERY, Mr. DONALD C. MCCREERY, Mr. ROBERT M. WORK, Messrs. STEPHENSON & STEPHENSON, for defendants in error.

Mr. Justice Scott delivered the opinion of the court.

In a general adjudication of priority rights to water for irrigation purposes in Water District No. 1, in the District Court of Weld county, entered on the 1st day of November, 1895, the Fort Morgan Land and Reservoir Company, predecessor to the defendant in error, The Bijou Irrigation District, was awarded a decree for 125 cubic feet of water per second of time, as of priority date of October 1st, 1888. These waters were from the South Platte river.

The provision contained in the decree, material here, was as follows:

"Said ditch since its construction not having as yet been used to its full capacity for the irrigation of the lands thereunder, and only a portion of the lands lying under said ditch and intended to be irrigated there from having as yet been irrigated. And it is hereby ordered, adjudged and decreed that there be allowed to flow into said ditch from said stream, for the benefit of the parties entitled thereto, at such times as the same may be needed for the irrigation of lands thereunder, under and by virtue of appropriation by construction of said ditch, and the diversion and use of water thereby, and on Priority No. 41, as aforesaid, one hundred and twenty-five (125) cubic feet of water per second of time, without prejudice to the rights of said ditch or the owners thereof to have adjudged to it a larger appropriation of water under said priority upon further and additional testimony as to the appropriation and use of a larger amount of water thereby, within a reasonable time."

In a special proceeding and upon petition of Charles J. Cooper, predecessor of The Trowel Land and Irrigation Company plaintiff in error, a decree was entered in said court on July 14th, 1904, granting to The Trowel Ditch a priority which was numbered 49, for 90 second feet of water, of priority date of December 27, 1900, and at the same time denying the claim of said ditch to 15 second feet of water claimed as an overflow right. All parties here appearing at that time interested in the appropriated waters from the stream, were made parties to the latter proceeding; a referee was appointed and all parties including the defendant in error and its predecessors were duly notified, and appeared at the hearing, both before the referee and the court.

In that proceeding the Bijou company nor its predecessors made claim of right for additional priority to that awarded by the decree of 1895. The Broad Run Investment Co., predecessor to The Trowel Company appealed to this court from that part of the decree which denied its claim

to the 15 second feet as an overflow water right. The judgment of the District Court was affirmed. *Broad Run Investment Co. v. Deuel & Snyder*, 47 Colo. 573.

This proceeding is one in general adjudication of the water rights of District No. 1, in the said Weld County District Court, instituted January 5th, 1909, and the claimed priorities of the plaintiff and defendant in error only, are here involved. The Bijou Irrigation Company, claimant of the Bijou ditch and canal, filed its statement of claim for 450 cubic feet of water per second of time claiming priority as of October 1st, 1888, the date of its former decreed priority, and an additional 85 cubic feet per second of time, as an enlargement, as of date of April 1st, 1900. The 450 second feet so claimed was to include the 125 granted under the decree of 1895.

By the decree now under consideration the court allowed the claim of The Bijou Company for 450 second feet including the 125 feet allowed by the decree of 1895, as of date of October 1st, 1888, and an additional 50 cubic feet per second as of priority date of April 1st, 1900, under its claim of enlargement. It will be noted that these priorities antedated the Trowel ditch priority of date of December 27th, 1900, for 90 cubic feet under the decree of 1904. The court further renumbered the Trowel ditch priority, making it No. 56, instead of No. 49, as fixed by the original decree.

The claim of the Trowel ditch was and is, that it is entitled to a priority of 90 feet as of date of December 27th, 1900, superior to the claim of the Bijou ditch, excepting only the 125 cubic feet awarded that ditch by the decree of 1895. The Trowel ditch also claims a priority under the Shoemaker Seepage Ditch, which will be later considered.

It is the contention of the plaintiff in error that in this general adjudication proceeding it was improper to assail its decree of 1904, for the reason that both the two and four year statutes of limitation had elapsed prior to the institution of the proceeding; that the proceeding of 1904 was regular, and was sustained by this court in the Broadrun

case and therefore the doctrine of *res adjudicata* must apply.

The Bijou Irrigation Company on the other hand contends that the decree of 1904 was a special proceeding; that it was a proceeding for the adjudication of the rights of the Trowel Ditch only, and that no general notice was given to all priority holders in the district to come in and make proof of their claims, and that it was entitled therefore to come in and "have adjudged to it a larger appropriation of water under its priority, decreed in 1895, upon further and additional testimony as to the appropriation and use of a larger amount of water thereby, within a reasonable time," as provided in its original decree.

The real question here is, what are the priority rights of the Bijou Company, to the water decreed in this proceeding, by relation to the decree of 1895, and are such rights prior and superior to these decreed to the Trowel Company by the intervening decree of 1904. The decree of 1895 gave the Bijou ditch 125 cubic feet per second of time as of date of October 1st, 1888. It is conceded that to this extent, the decree is absolute and is not to be disturbed.

Counsel for the Trowel Land and Irrigation Company say that the contention in behalf of that company is in no sense an attack upon the decree of 1895. That the attack is upon the award in the present proceeding to the Bijou ditch, of the 325 feet as additional to, and part of, the awards of 1895 decree, and the dating thereof as of the date of the award in that decree. Also upon the award of 50 feet additional by reason of the enlargement as of date of April 1st, 1900.

In the adjudication proceeding now under consideration, the court found in substance that the owners of the Bijou ditch and their predecessors in interest:

"Within a reasonable time after construction of its original capacity and continuously since, the full amount of 450 cubic feet was diverted when supply was available, and was applied to irrigation of lands. Work of construction

upon said enlargement was begun April 1, 1900, and was completed with due diligence within a reasonable time and continuously since, whenever supply was available, there has been diverted by said enlargement and applied to irrigation of lands the amount of 50 cubic feet of water in addition to that diverted by its original size. The amount of land to which water has been applied by this ditch is 38,400 acres. There is served by this ditch and by Bijou No. 2, and Empire Reservoirs, the total amount of 50,000 acres of land which lie under this ditch, and are susceptible of irrigation from it.

The volume of water appropriated from the South Platte River by original construction and use of said ditch is the amount of 450 cubic feet per second; said appropriation took effect October 1, 1888. The ditch priority No. 41 awarded this ditch conditionally in the decree in the case No. 433 should be made final for the amount of 450 cubic feet per second, to date from October 1, 1888. This is the entire amount of said priority.

By said enlargement claimant has appropriated from said river for said use the additional amount of 50 cubic feet of water per second, said appropriation took effect April 1, 1900; said ditch is thereby entitled to ditch priority No. 51 in Weld, Morgan and Washington Counties."

It is conceded that by the 1895 decree the ditch was found to have capacity of 450 feet per second of time, though by reason of non-application to a beneficial use, its decreed priority was necessarily limited to 125 feet per second, and the date of its priority was fixed by the decree as of October 1, 1888. Then if there is evidence in this case upon which to base the further findings of the court as to reasonable diligence and application to beneficial use, such findings may not be disturbed, and under the settled law and by the doctrine of relation in this jurisdiction, its priority for the 450 feet so applied must be fixed as of date of October 1, 1888.

The testimony shows that the enterprise passed through many vicissitudes, including foreclosure, and changes of ownership, until about the 1st day of April, 1900, when work of repair commenced and continued, with the application of water, when available, until time of trial. The expense upon the ditch since such renewal of diligence is estimated at \$200,000. Water running through the ditch has been used to supply the Bijou reservoir owned by the same company. We think the testimony justifies the finding as to the number of acres which have been and are now being irrigated from the ditch, and the capacity of 550 cubic feet is not disputed.

It may be well questioned whether reasonable diligence is shown from the date of the 1895 decree up to April 1st, 1900, and if the priority of Trowel Company had attached prior to the latter date, when the defendant in error resumed and continued active diligence, we are inclined to believe that the doctrine of relation could not be held to apply as against the decreed priority of the Trowel Company, though we do not decide the point. But the Trowel Company claimed and was decreed a priority as of date of December 27th, 1900, more than six months after the resumption of work by the Bijou owners.

Under the doctrine of *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. App. 130, 40 Pac. 1066, the Bijou Company had cured its laches and by its continued acts of diligence to completion and application was entitled to perfect its right. It was said in that case:

"That the interval from 1882 until 1893 was presumptively too long must be conceded, were the reasons and circumstances unexplained—and the explanation in this case can hardly be deemed sufficient—but how can that enure to the benefit of appellants? If, by neglect to apply the water within a proper time, the right to apply was forfeited, the water reverted, and any one could proceed to appropriate and apply it; but such right could only attach while the right of the former claimant was in abeyance by reason

of his negligence, and the second party must have availed himself of the right before the re-entry and prosecution of the enterprise by the first party. Unless, during the interim, when by failure to prosecute the enterprise, the water right may be regarded as having reverted, some party intervenes and makes a valid and legal appropriation of the water, the first party may resume, and if such resumption occurs before intervening rights attach, the right to appropriate is lost." See also *Rogers v. Pitt*, (C. C.) 129 Fed. 932, and *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571.

As to the fifty second feet decreed by the court to the Bijou Company by virtue of an enlargement as of priority date of April 1st, 1900, we can not disturb the finding and decree. The appropriation antedated that of the Trowel Company by more than eight months, and the evidence is sufficient to sustain the claim of reasonable diligence and application to beneficial use.

It is urged that as the Trowel decree was entered on July 14, 1904, and this proceeding instituted on January 5th, 1909, the two and four years statutes of limitations constitute a bar to this proceeding in so far as it relates to the priority of appropriation in excess of the award of 1895. The decree of 1895 awarded a priority of 125 cubic feet only. This award is not questioned and it is the only final award. These statutes of limitation run only against a final and an absolute decree. Sec. 3837 M. A. S. 12. The rights of the Bijou Company claimed or determined in this proceeding were not finally decreed in the adjudication of 1895.

It is also contended that the Bijou Company is estopped from asserting its claim here determined, for the reason that, though notified and appearing in the proceeding resulting in the Trowel decree of 1904, it failed to assert its claim.

It is sufficient answer to say that the right of that company is controlled by the rule of reasonable diligence, and it is not bound to assert its claim in any particular special

proceeding. If the Bijou Company was duly proceeding under an inchoate right to the completion of its enterprise, it is not within the province of one who institutes a special proceeding to determine when its claim shall be adjudicated.

It is contended on the other hand by the defendant in error that the decree of 1904, awarding the Trowel ditch a priority as of date of December 27, 1900, for ninety cubic feet of water per second, is invalid. The contention is that the decree was rendered in a special proceeding, that the petition was confined to the one appropriation, and was not made in a statutory proceeding for a general adjudication. In view of our holding here the question becomes immaterial as it relates to the defendant in error. But the parties to this proceeding were likewise parties to that, and this court treated the proceeding as a proper one in which to obtain the decree rendered. *Broad Run Co. v. Deuel*, supra. The priority of the Trowel Company in that respect stands adjudicated, as does its claim for an appropriation of 15 feet, as an overflow right, and the trial court seems to have so treated it.

We must therefore hold that the appropriation of the Trowel Company is valid, but is subject and junior to the priority of the Bijou Company as decreed by the trial court.

We now come to the claim of the plaintiff in error for an appropriation of seepage waters under the Shoemaker ditch, denied by the court.

The claim of the plaintiff in error, for the Shoemaker ditch and branches, is that it is a drainage ditch, and its purpose to drain waters from lands along and near the ditch and branches, theretofore rendered unfit for cultivation by reason of seepage and swampy conditions; that said waters had no outlet to, nor was it any source of supply for the South Platte River, or any of its tributaries; that such ditch was for the purpose of reclaiming said lands, and to use the water arising therefrom for irrigation purposes; that the claimant derived title to such waters by conveyance from the Jackson Lake Reservoir, situate above said lands, and

by conveyance of the right to collect and use said waters from the various owners of the lands through which the ditch and its branches were constructed, and by succeeding to all right to the Curry ditch, theretofore constructed; that the waters so collected are delivered to the South Platte River, which is used as a means of carrying such water to the headgate of the Trowel ditch, owned by the claimant, and there diverted from the river and used for irrigation upon the lands of the Trowel ditch; that there has been so developed 50 cubic feet of water; that work was commenced on the ditch, including the enlargement of the Curry ditch August 8, 1906, and that since that time said water has been so applied for irrigation.

The contention as against this claim is that the waters so drained are not the subject of appropriation, but are from waters theretofore appropriated and naturally tributary to the river before the appropriation initiated, and that such re-diversion must be according to relative priority of appropriation within the water district, which contention was sustained by the court and is now before us for review.

The referee's findings, approved by the court, show that the Shoemaker ditch and its branches lie between the Jackson reservoir and the Weldon Valley ditch, constructed several years before, and which is likewise a drainage ditch. That there is a rapid slope from the reservoir and from the Weldon Valley ditch to the South Platte River, and that underneath the upper soil of the land between the reservoir and the river there is a gravel substratum in which water flows definitely toward the river. The ditch is dug down to the gravel underground water course. There is a fall of 59 feet from the surface of the ground at the base of the reservoir to the river, which is directly south a distance of two and one-half miles. The appropriation claimed under the Curry ditch was abandoned in 1894, and thereafter such ditch became a natural water course, collecting underground waters and delivering the same to the river; that the waters intercepted by claimants' north

branch from seepage of the Weldon Valley ditch would have reached the river, through the gravel and by reason of the slope, if not intercepted by the ditch. That as to the waters escaping from Jackson reservoir and collected by the ditch, the evidence does not distinguish what part of such waters were collected by the north branch, or what part is from the Weldon Valley seepage, and that it is impossible to distinguish such waters. That there was a well defined water course through the substratum to the river from the Weldon Valley ditch at the time the Jackson reservoir commenced to store water.

The south branch of the Shoemaker ditch is the old Curry ditch, dug deeper into the gravel. Underground seepage, waste and return waters collected by this ditch and escaping from the Weldon Valley ditch had been tributary to the river before the Curry ditch was built, and thereafter by abandonment, the latter became a natural water course, and waters from the Weldon Valley ditch became tributary thereby, as well as underground, to the river. It is then concluded that while claimant may have hastened the flow to the river by the construction of the ditch, yet it has contributed no new supply.

The testimony discloses other facts not suggested in the findings. It appears that prior to the construction and filling of the Jackson reservoir, the lands afterward drained by the Shoemaker ditch were cultivated and dry lands, and that within a reasonable time thereafter these lands became seeped and swampy to such an extent as to make them wholly unfit for cultivation. That prior to the construction of the ditch the owners of the lands threatened suit against the reservoir company for damage occasioned by reason of the seepage water from the reservoir, and that at least one such action had been instituted.

The construction of the ditch was apparently a compromise between the reservoir company and the land owners, and to which enterprise the reservoir company largely contributed in order to avoid its liability for damage.

It further appears that the reservoir company and the land owners conveyed to Shoemaker, who constructed the ditch, their right to the use of the waters to be so drained, for use in irrigation. Shoemaker was the predecessor in interest of the Trowel Company. It also appears that the waters from these lands so drained had not reached the river, either by seepage or otherwise. It may be said further that it is clear that no perceptible quantity of water which seeped such lands came from any other source than the Jackson reservoir. And that substantially all water entering the Shoemaker ditch came from such undrained lands, with the exception of such as was drained by means of the old and then abandoned Curry ditch, which was afterward cleaned out and enlarged so as to carry the waters arising from the new part of the Shoemaker ditch. This water was in very small quantity; the exact amount is not ascertainable from the testimony. It also appears that lying on the lower side of the swamped lands so drained was a ridge of soil impervious to water and which apparently held back, or acted as a dam to hold the water upon the seeped lands, prior to the construction of the ditch. But it likewise appears that the ditch reached a depth below such formation and that the bottom of it was in the gravel and sand formation, which the court finds to extend from the Jackson reservoir to the river.

It also appears that Shoemaker expended something like \$20,000 in the construction of the ditch, upon the theory that he should have for his own use the water so gathered, and that he was induced to so believe by the statements, acts and direction of the State Engineer, who caused the waters to so flow into the stream and to be diverted and applied as claimed, from the completion of the ditch, in 1907, up to the year 1910, a time subsequent to the initiation of this proceeding, and that all this was done without an effort to notify Shoemaker of any claim as now asserted against his rights. It is not contended, however, that these facts act as an estoppel, but that in equity they should be considered.

In considering the fact that the seepage waters from the drained area, arising because of escape by seepage from the Jackson reservoir, had not reached the river, counsel lay stress upon language used in the case of *Comstock v. Ramsey*, 55 Colo. 244, 133 Pac. 1107, as follows:

"We do not hold that there can be no independent appropriation of seepage, return and spring waters; but on the contrary, where such appropriation does not interfere with a prior right, that it may be done upon facts and conditions which warrant it. What and all we do intend to here determine, on this particular point, is that where it appears that such waters are in fact tributary to the stream, and form a substantial and material source of its supply, upon which appropriators therefrom have long depended for water to satisfy their priorities, that then, as between such bona fide appropriators and users of such waters and a new claimant, the former has the first and better right."

It is then contended that the water here had not reached the river, and had not long been depended on, or at all, to satisfy ditch priorities, and is therefore not within the rule in that case. But the language referred to has a broader meaning and can not be confined to the physical fact that the particular water involved had not reached the stream, but rather to escaped waters generally which would naturally, and in course of time, reach the stream. Indeed, the finding of the trial court in that case, supporting the contention here, was expressly repudiated, for there, as here, the seepage water involved had not in fact reached the stream. The important fact is whether or not the seepage water is naturally tributary, or will naturally return to the stream, and the court said:

"We take judicial notice of the fact that practically every decree on the South Platte River, except possibly only the very early ones, is dependent for its supply, and for years and years has been, upon return, waste and seepage waters. This is the very thing which makes an enlarged use of the waters of our streams for irrigation possible."

Counsel further contend that there is a distinction between the relation of ditch owners in this respect, and reservoir owners where the water is impounded, in that, except in case of negligence, the ditch owner has no concern as to escaped waters, while the reservoir owners is responsible for damage occasioned by escaped water, regardless of the question of negligence. It is argued that the reservoir owner must be allowed to exercise control over the water impounded, both while so impounded and during the course of its release, so as to protect himself from damage, and that logically under such conditions it would remain the property of the reservoir owner until its abandonment; and if sold while in the dominion of the reservoir owner, the purchaser should acquire good title thereto.

Doubtless a reservoir owner, if he may have acquired the right of way, may construct a ditch and drain the lands which the reservoir may have damaged, as an alternative to being mulcted in damage, but this can not confer the right to sell the use of such drainage water if it may naturally return to the stream.

Even if this contention were to be accepted, it can not be applied to the facts in this case. It is patent from the testimony and from counsel's argument that the purpose of the reservoir company was to avoid its liability in damage, and not to apply the seepage water to a beneficial use, and it did not do the latter, but on the contrary contributed funds toward the construction of the ditch, without other reward than the accomplishment of its prime purpose.

The law makes no distinction as relates to the return of water to the stream between that from a reservoir supplied by a natural stream, or from a ditch supplied directly from the stream, regardless of the fact that the reservoir may be chiefly supplied in time of high water, or in the non-irrigation season.

In the *Ramsey* case, the seepage water involved escaped water, both from a reservoir and ditch, and it was there said, speaking of the identical stream here involved:

"Every appropriation of water on this stream, claimed and decreed for irrigation purposes, has been so claimed and decreed upon the theory that all waste and seepage water arising from the irrigation of land, or from the construction and maintenance of reservoirs using water from the river, and naturally returning to it, is available to supply such appropriations and decrees."

We think the fact as found by the court that there is a continuous stratum of gravel formation reaching from the Jackson reservoir to the river, through which the seepage waters involved may pass, by percolation, and thereby naturally reach the river from which such waters were originally diverted, is controlling in this case, and that the reasoning in the *Ramsey* case must be applied.

On the first day of June, 1910, the Trowel Company institutes a suit in the District Court of the City and County of Denver, praying a mandatory injunction to compel the water officers to divert the water from the Shoemaker ditch into the Trowel ditch, which it was alleged it refused at that time to do.

The complaint in that case alleged the same state of facts as in its claim in this case. The water officers demurred to the complaint upon the grounds that it did not show an adjudicated right in plaintiff to the use of such waters; that the complaint on its face shows that this general proceeding was at the time instituted and pending, and that the court was without jurisdiction to determine the water rights in water District No. 1.

The demurrer was overruled and the defendants electing to stand upon their demurrer, the injunction was granted in accord with the prayer of the complaint. That case is now before us for review, entitled *Samples et al. v. The Trowel Land and Irrigation Co.*, 176 Pac. 297, and by agreement is to be determined in connection with this case.

It is alleged as error that the trial court refused to give full force and credit to the judgment rendered in that case. It is clear that the court was without jurisdiction to hear

or determine the cause and the demurrer should have been sustained and the cause dismissed. The complaint failed to allege a decreed right to an appropriation in the ditch.

It has been uniformly held by this court that the decree in such case is the sole and only guide and authority for water officials, from which they must determine in the discharge of their duties the relative rights of parties, the volume to which different ditches are entitled, the point of diversion, and all other data necessary to a distribution of the waters in accordance with the provisions of the decrees. We take judicial notice of the fact that under and in accordance with the provisions of the law, the District Court of Weld County has exclusive jurisdiction in matters of adjudication of water rights in District No. 1.

The judgment of the District Court of the City and County of Denver was without force or effect, and the court did not err in refusing to consider it.

The judgment is affirmed.

En banc.

White, J., specially concurring.

Garrigues, J., concurring in part and dissenting in part.

Hill, C. J., not participating.

Decided May 6, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 8898.

RIO GRANDE SOUTHERN RAILROAD COMPANY v. CAMPBELL.

1. MASTER AND SERVANT—*Duty of Master as to Appliances.* It is the duty of an employer to exercise reasonable effort to keep in suitable condition for use the machinery and appliances used by his employees.
2. — *Railway Company,* owes to its employees reasonable care to keep its rolling stock in reasonably safe condition. Inspection and tests must be made at proper intervals, and the company is bound to know the condition of its cars, so far as such inspection suffices.

That the couplings, defect in which was alleged to have occasioned

the injury, "looked all right" when the cars were taken into the train, and that no defect therein was manifest before the accident was held not to establish conclusively that the defect did not exist before the accident.

3. — *Duty of Servant.* A railway brakeman is not bound to go under the cars of a train upon which he is employed, in order to ascertain the condition of the couplings. A rule of the employer that the couplings "must be examined before the coupling is made," requires no such diligence on the part of the brakeman.
4. *VERDICT—Excessive Damages.* A verdict of \$12,075.00 held not to evidence passion or prejudice on the part of the jury.

Error to LaPlata District Court, Hon. William N. Secary, Judge.

Mr. E. N. CLARK, Mr. R. G. LUCAS, Mr. T. M. STUART, JR., Mr. REESE MCCLOSKEY, for plaintiff in error.

Mr. B. W. RITTER, Mr. EDGAR BUCHANAN, Mr. CHARLES A. JOHNSON, for defendant in error.

Opinion by Mr. Justice Allen:

On June 8, 1901, the defendant in error, hereinafter referred to as plaintiff, was in the employ of the plaintiff in error, hereinafter referred to as the railroad company, as a brakeman on a freight train. On the date above named the plaintiff was injured while coupling cars in a train upon which he was braking. Thereafter he brought suit against the railroad company to recover damages, basing his right thereto upon the ground that his injury was caused through the negligence of the company.

The judgment for plaintiff which was obtained as the result of the first trial was reversed in *The Rio Grande Southern Railroad Company v. Campbell*, 44 Colo. 1, 96 Pac. 986. A second trial resulted in another judgment for plaintiff, and the judgment was again reversed in *Railroad Company v. Campbell*, 55 Colo. 493, 136 Pac. 68, Ann. Cas. 1914 C 573. The last trial, in December, 1915, resulted in a verdict in favor of the plaintiff for \$12,075, upon which a judgment was entered against the railroad company,

which now brings this case here for review for the third time. Fifty-three alleged errors are assigned, but the principal contention of the plaintiff in error, and the proposition most seriously argued, is that "the evidence fails to show that the defendant (railroad company) was guilty of negligence in the respects alleged in the complaint, and limited by the agreed statement of the issues."

The complaint contained allegations to the effect that the couplers upon the cars were of the oldest style of pin and link couplings, and that couplings could only be made by going in between the ends of the cars that were to be coupled, and make such couplings as the cars came in contact with each other; that while attempting to couple cars, numbered 1050 and 1925 respectively, in the usual and customary way, the couplers or drawheads on both of the cars fell down and gave way, the ends of the cars came together, and plaintiff was crushed and injured between the ends of the two cars. The truth of these allegations is not disputed.

The negligence of the defendant is charged and specified in the following portions of the complaint:

"That each of said cars between which plaintiff was injured, and the drawheads thereon, and the bolts, nuts, irons and beams and other appliances for holding said drawbars in place on said cars so attempted to be coupled by plaintiff were old and decayed, worn, weakened, loose and defective in each of said respects. That some of the nuts and bolts formerly holding said drawbars were lost and gone. That so defective from said causes was said drawbars and their fastenings, that, upon their ends coming in contact, they bent and fell down, and gave to the plaintiff no protection whatever, but allowed the ends of said cars to come together, crushing the plaintiff between them as aforesaid, and the nut at the back end of the drawbar or drawstem where the same passes through the beams and wood composing the lower end of the said car No. 1925, and which holds and secures in place the back end of said drawbar or stem, had been permitted to become loose and insecure,

and in considerable part unscrewed, so that said drawbar and the coupler on the end thereof was loose and insecure, and when the same came in contact with the coupler and the drawbar upon the other of said cars, by reason of said condition, the same turned down and plaintiff was crushed and injured as described.

"That all the defects aforesaid might have been known to the defendant by the use of ordinary care and prudence in the inspection of its * * * cars and their appliances, and in the timely repairing of the same, or substituting proper cars and appliances therefor.

"That, in truth and fact, the said defendant did not know at and before said time of each and all of said defects, but negligently continued said * * * cars and appliances in use in said defective and unsafe condition, and wholly failed to make any careful and repeated inspection of said * * * cars and appliances, and the making of proper repairs thereon, and the substitution of proper * * * cars and appliances in the place of said defective ones."

The evidence shows that the drawheads did fall and cause the plaintiff to receive injuries, at the time, in the manner, and under the circumstances as alleged in the complaint. The evidence is sufficient to support the conclusion that the drawheads dropped down because of a defect or disorder in and of the coupling apparatus of which the drawheads in question were a part, and that such defect consisted principally in a looseness or "play" of each of the drawstems or drawbars. The plaintiff testified that in attempting to make the coupling, he properly inserted the link. The jury were at liberty to regard this testimony as true, and if they did, they would of course properly conclude that the accident was not caused by the failure to insert the link in the proper manner. The cars did not come together with any unusual or severe force or impact, and this fact justifies the belief that the accident was not caused by the impact. Drawheads had been known to turn down because the drawstem had become loose, and under the circum-

stances of this case, it is not a mere conjecture to say that the drawheads in question turned down for the reasons specified in the complaint.

A looseness or play of the drawstems, which were connected with the drawheads in question, was noticed or discovered after the accident by several of the witnesses. Probably some of this looseness or play was caused by the accident itself. Nevertheless, the facts and circumstances warrant the conclusion that there was a comparatively great deal of looseness of such drawstems prior to the accident, and that such defect, and other defects in the coupling apparatus, as alleged in the complaint, constituted the proximate cause of the accident. A looseness or play of the drawstems, in itself, was sufficient to permit the drawheads to drop, and thereby cause the accident. It is reasonable to infer that the jury were justified in finding that the falling of the drawheads, on the occasion of the accident, could not have been due to any other cause, since if the drawstems were in order, and not defective or loose, they would have held the drawheads up and in their proper place.

It is true that the evidence shows that the drawheads were apparently in their proper position when the cars were first taken into the train, and that they fell for the first time when the coupling referred to in the complaint was sought to be made. The fact that the drawheads did not drop at any time prior to the accident, and that the plaintiff found that the coupling appliances, as he testified, "apparently looked all right" when each of the cars in question were taken up, does not conclusively prove that no serious defect in the coupling apparatus existed before the accident. The testimony discloses, and the fact is not disputed, that these two particular drawheads which fell when coming together were brought together for the first time when the coupling which is connected with the accident was attempted to be made by the plaintiff. Prior to that time the two cars, numbered 1050 and 1925, bearing these particular

drawheads, were not attached to each other, but were located in different parts of the freight train, other cars being between them. The theory of the plaintiff appears to be that if the drawhead of one car were firmly and properly held in place by a drawstem in good order, such drawhead could not itself fall or drop, and by remaining in its proper position when pushed against the drawhead of another car would prevent such other drawhead from falling down, even if the latter were loose, and would push a loose drawhead back to the springboard. On the other hand, according to the argument of counsel for plaintiff, if both drawheads which come together are held by loose and defective drawstems, the impact and consequent jarring would cause each of them to drop as the drawheads on cars 1050 and 1925 did drop or turn down at the time of the accident. The jury were at liberty to take this view, and to regard plaintiff's theory as to the cause of the accident as being correct.

Car numbered 1050 was picked up at Porter, and car 1925 was taken up at Bells Spur. From Porter down to and past Bells Spur, and on down to the place of the injury, a distance of about four miles, the freight train ran on a continuous downgrade. There was no upgrade, and no pull nor anything in the operation of the train between these points that would put any strain upon the cars, their coupling appliances, or upon the drawbars which were found loose and out of order. The facts just mentioned and the circumstances hereinbefore referred to warranted the jury in concluding not only that the drawstems on cars 1050 and 1925 were loose and out of order shortly prior to the accident, but also that the defects existed prior to the time the cars were taken into the train.

The plaintiff in error also contends that the "evidence does not show that defendant knew or was chargeable with notice of the defects, if any there were, in said cars." In other words, it is claimed that no negligence, to which the condition of the coupling appliances can be attributed, has been proven.

It is the duty of an employer to make reasonable efforts to keep machinery and appliances used by his employees in suitable condition for use. *D. & R. G. R. R. Co. v. Sipes*, 26 Colo. 17, 23, 55 Pac. 1093. It was the defendant's duty to exercise reasonable care to discover defects in the appliances furnished. *Muldorney v. Ill. Cent. Ry. Co.*, 36 Ia. 463. Railroad companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably safe condition, and when a brakeman or other employee, in the proper discharge of his duty, is injured from a failure on the part of the company to perform its duty with reference to the safety of its appliances, the company is liable. *King v. Ohio, etc., R. Co.*, 14 Fed. 277. The trial court properly instructed the jury that:

"The duty of the defendant is simply that of ordinary care and caution under the circumstances, and the defendant would only be liable for the result of such defects in said cars and coupling appliances as it had knowledge of, or should have had knowledge of, by the exercise of reasonable and ordinary diligence on its part, in time to remedy the same."

Under this instruction the jury found against the defendant, and we can not say that such finding was manifestly against the weight of the evidence.

There is evidence of the existence of various circumstances from which the jury could reasonably infer that the defendant company failed to exercise due care in keeping its coupling appliances safe. Cars 1050 and 1925, between which the plaintiff was injured, had been used by the defendant for about ten years, and had been during that time in practically constant service upon the railroad, the general condition of which, it was testified, "is curves and grades." The basis of the duty of inspection being the tendency of appliances to deteriorate while in use, it is manifest that the necessity for vigilance on the employer's part constantly increases the longer that use continues. (Note in 41 L. R. A. 80.) The length of time which an ap-

pliance has been in use may be a specific circumstance which puts an employer upon inquiry as to the condition of such appliance. 3 LaBatt, Master & Servant, sec. 1061 (c). The testimony shows that cars 1050 and 1925 were second-hand cars which had been used when they were put in service on defendant's railroad. This fact and the fact that the cars had been used for about ten years by the defendant was a circumstance which the jury were entitled to consider, in connection with other facts, in determining whether or not the company should have known of the defect at and before the time of the accident. There was testimony to the effect that the defect was of such nature that it would readily have been discovered by a car inspector. The fact that it was not discovered tends to prove that no recent inspection had been made. Furthermore, the defendant offered no evidence that an inspection had ever been made, or that the drawstems on cars 1050 and 1925 had ever been replaced or repaired, although drawstems on other cars had to be and were replaced. The defendant company knew the character of its roadbed, the grades and curves of the same, and the effect that constant use on such road would and actually did have upon drawstems, subjecting them to great strain, and requiring them to be frequently replaced. The defendant knew why and to what extent it should take precautions to maintain its coupling appliances in a suitable and safe condition, and the danger involved when drawstems became loose or defective. The jury had a right to infer, from all of the circumstances disclosed, either that the defendant company negligently failed to make inspection of the cars in question, or that the inspection, if any there had been, was careless, insufficient, or negligently made. It is the duty of an employer to inspect or have inspected the appliances with which his employees work. 18 R. C. L. 561, sec. 73.

The inspection and tests must be had and made at proper intervals, and the master is bound to know the condition of his property so far as proper inspection will enable him

to know it. See note in 41 L. R. A. 74, 75. The master is chargeable with knowledge of any defect that a proper inspection would have disclosed. 18 R. C. L. 567, sec. 73.

Under the evidence in this case, and in view of the authorities cited, the trial court could not, as a matter of law, find that no negligence on the part of the railroad company had been shown, and direct a verdict for the defendant on such ground. This being true, the question of negligence was properly submitted to the jury. *Catlett v. Colo. So. Ry. Co.*, 56 Colo. 463, 471, 139 Pac. 14.

We are also of the opinion that under the evidence the jury were justified in finding that the plaintiff was not guilty of contributory negligence. The plaintiff testified that the defect was not apparent and that he did not notice it before the injury. The drawheads were apparently in place, and would seem to be in place, and there would be no obvious indication of danger even if the drawheads were not resting or held squarely against the spring board. The only way to detect defects in the drawbars would be to get down under the car and give it such an inspection as ought to be given it by a car inspector. Such close inspection was no part of the duty of the plaintiff. Rule 204 was not regarded, even by the railroad company, as requiring such close inspection. While the rule provides that "drawheads, drawbars and coupling apparatus must be examined before coupling is made," it appears from the testimony that trainmen, when acting in compliance with the rule, made the examination only by seeing that everything looked all right, and that the apparatus appeared to be in good order. This was done in this case when the cars were attempted to be coupled. The defendant's witness Doze appears to have regarded the rule as having been complied with by the plaintiff. A close inspection of all parts of the coupling apparatus by trainmen while on their run is impracticable. We do not think that under the circumstances above mentioned the defendant is in a position to claim that plaintiff violated the rule, or to secure any advantage from the fact

that the plaintiff did not make a more thorough inspection of the coupling apparatus than he did.

The evidence is voluminous, and affords room for much discussion and for conflicting views as to its effect. We are of the opinion that there is sufficient competent evidence to support the verdict for plaintiff, and to uphold a finding for plaintiff upon each of the material issues involved in this case. Whatever our view may be as to the weight of the evidence, as to any one or more of the issues of fact, we are not at liberty to disturb the verdict. The alleged errors having reference to the admission or rejection of testimony, if it be assumed that they were errors in any sense, were not of such a prejudicial character as to warrant a reversal, and need not be discussed. The instructions were fair and substantially correct, and in view of the instructions given there was no error in refusing the instructions requested by the defendant.

The verdict for \$12,075 is undoubtedly large, but under the evidence we can not find that the verdict is so large as to make it apparent that the jury was influenced by prejudice, misapprehension of the evidence, or corrupt or improper considerations. For this reason the verdict will not be disturbed on the ground of being excessive.

The judgment is affirmed.

Affirmed.

Decision *en banc*.

Decided May 6, A. D. 1918. Rehearing denied December 2, A. D. 1918.

Nos. 9172, 9173.

TRACY v. THE PEOPLE.

1. CRIMINAL LAW—*Information—Sufficiency*. An indictment or information which describes the offense in the language of the statute, or so plainly that what is charged may be readily understood by a jury, is sufficient.

An information charging the accused with having obtained from a prosecutrix a sum of money by falsely and fraudulently repre-

senting to her that a certain tract of land which he exhibited to her was a specified quarter section, and public land, contrary to the fact, *held* sufficient to sustain a conviction.

2. — *Evidence—Other Crimes.* A crime other than that charged but so similar in character, and so closely connected therewith in time, that a like motive may be fairly imputed to each transaction, is admissible to show the intent.
3. — *Order of Proof,* is largely in the discretion of the trial court. Where the names of certain witnesses examined in rebuttal were upon the indictment it was held that there was no abuse of discretion though the testimony might be regarded as part of the case in chief.

Error to Otero District Court, Hon. Charles S. Essex, Judge.

Messrs. SABIN, HASKINS & SABIN, J. A. TRACY, Pro Se., for plaintiff in error.

Hon. LESLIE E. HUBBARD, attorney general; Mr. BERTRAM B. BESHORE and Miss CLARA RUTH MOZZOR, assistants attorney general, for The People.

Mr. Justice Bailey delivered the opinion of the court.

IN this case defendant below was tried and convicted under Section 1849, R. S. 1908, for obtaining money by false pretenses. Defendant is a real estate man and land locator. He was tried upon two informations, which were consolidated. They alleged in substance that he obtained money from the prosecuting witnesses, two sisters, for showing them a certain tract of land which he said was section 26 in Township 26 South, Range 59 West, and open to public entry, but which was in fact not such section and not part of the public domain, the real section 26 being greatly inferior land and some distance away from that shown by the defendant. The information also sets up other alleged false and fraudulent statements as made by defendant in reference to the character of the land, the possibility of cultivating it without irrigation, and other particulars, all of which it is claimed by the prosecuting witnesses were urged as inducements to them to file on section 26.

As a result of these acts of defendant, the prosecuting witnesses did file on said section 26, one of the women filing

on the west one-half, and the other on the east one-half, of the section, and each is alleged to have paid defendant \$300.00 for his services. When they attempted to go upon the land shown to them by defendant as section 26, they discovered that it was not such section, and was not subject to entry, and that the other representations made to them by defendant were false.

Defendant was found guilty as charged in both of the informations, and was sentenced to a term of from six to eight years in the penitentiary. He brings the case here for review on error.

It is alleged and vigorously urged by the defendant that the informations in the two cases are fatally defective in that they fail to state any offense under the statute, and that they are not sufficiently specific as to the land claimed to have been shown to the prosecuting witnesses as section 26.

It has been repeatedly held in this state that an indictment or information is sufficient which describes an offense either in the language of the statute, or so plainly that the nature of the crime may be readily and easily understood by a jury. *Dougherty v. People*, 1 Colo. 514; *Cohen v. People*, 7 Colo. 274, 3 Pac. 385; *Imboden v. People*, 40 Colo. 142, 90 Pac. 608; *Knepper v. People*, 165 Pac. (Colo.) 779.

In this case both informations are identical except that in one the false pretenses are alleged to have been made to one Tillie Thede, as to the east one-half of section 26, and in the other to Minnie Thede, as to the west one-half of such section.

Defendant contends that, although he is charged with having obtained money from the prosecuting witnesses by showing them a certain tract of land, and representing it as the said section 26, and open to government entry, when in truth and in fact it was not, for the purpose of locating them on that section, there is no allegation that the women did in fact file on section 26, and therefore the informations are fatally defective. The essential parts of the informa-

tions so far as they are here involved are as follows:

" * * * That J. A. Tracy, on or about the 6th day of April, A. D. 1916, at the County of Otero, State of Colorado, did then and there feloniously, knowingly and designedly did falsely pretend to one * * * Thede that a certain tract of land located in the County of Otero, State of Colorado, was the west one-half of section 26, * * * and that the same was subject to government entry and was located in a region that without irrigation good crops * * * could be grown on the land and in said region and locality, and that said land was located four or five miles from the town of Bloom, a good town with several stores and good lumber yard; which said false pretenses were then and there made by the said J. A. Tracy, with the design and for the purpose of inducing the said * * * Thede to pay him, the said J. A. Tracy, the sum of three hundred dollars for locating her, the said * * * Thede upon said land and paying the filing fee upon the same; and the said * * * Thede, relying upon and believing the said false pretenses to be true, and being deceived thereby, was then and there induced, by reason thereof, to pay to the said J. A. Tracy the sum of three hundred dollars, by which said false pretenses he, the said J. A. Tracy, with intent to cheat and defraud the said * * * Thede, feloniously and fraudulently, designedly and knowingly, did obtain from the said * * * Thede * * * the total value of three hundred dollars of the personal property, goods, chattels and moneys of the said * * * Thede, whereas in truth and in fact the said tract shown to the said * * * Thede was not the west one-half of section 26 * * * and was not land that was subject to government entry, and was not land upon which good crops * * * could be grown, and that the true location of the said west one-half of section 26 * * * was other than the location shown to the said * * * Thede, and was rough, hilly land and not so desirable as the tract shown to the said * * * Thede, by the said J. A. Tracy, and

that the said town of Bloom did not possess a lumber yard and had but one small store; all of which said false pretenses he, the said J. A. Tracy, at the time he so falsely pretended as aforesaid, well knew to be false, contrary to the form of statute * * * .”

These informations are good if defendant is advised with sufficient certainty of the offense with which he is charged, and if the offense is so clearly set out that judgment may be passed thereon. The essentials of an indictment or information for obtaining property by false pretenses are thus enumerated in 11 R. C. L. 857:

“An indictment for obtaining property by false pretenses is sufficient if the language used is such that it designates the person charged and indicates to him the crime of which he is accused. It must, however, have that degree of certainty and precision which will fully inform the accused of the special character of the charge against which he is called on to defend, and will enable the court to determine whether the facts alleged on the face of the indictment are sufficient in the contemplation of law to constitute a crime, so that the record may stand as a protection against further prosecution for the same alleged offense. It must aver all the material elements of the offense, and hence must show what the false pretenses were; that they were made or authorized by the defendant; that they were false and fraudulent; and deceived the prosecutor; and what was obtained by or under them.”

It is plainly manifest that the informations herein show that the false pretenses were the pretenses that certain land was section 26, of a certain township, when in truth and in fact it was not such section; that defendant showed the land and made the statements to the prosecuting witnesses; that the statements so made by him were knowingly false and fraudulent, and that they deceived the prosecuting witnesses, and as a result of such deception they gave to defendant \$300.00 each. As matter of fact, the essential elements are so plainly alleged that they are beyond all possibility of doubt.

In *Stoltz v. People*, 59 Colo. 342, 148 Pac. 865, the information charged that defendants knowingly, falsely and feloniously designated and exhibited to prosecuting witness certain property as "then and there being the lands, reservoirs, reservoir sites, ditches, canals waters and water rights of, belonging to and owned" by a certain corporation, and designedly, knowingly, fraudulently and feloniously pretended and represented to prosecuting witness that two thousand shares of the corporate stock of the company constituted a valuable interest in the property, and that as a result of such representations the prosecuting witness gave defendants a check for the shares, which defendants cashed and appropriated to their own use; and "whereas, in truth and in fact," the property previously pointed out did not belong to the corporation, and the shares did not represent any interest therein, all of which defendants "at the time of the making of the false, fraudulent and felonious pretenses aforesaid," well knew, and that defendants "did by means of the false, fraudulent and felonious pretenses aforesaid" made as aforesaid, "unlawfully, knowingly, designedly and feloniously obtain of and from" the prosecuting witness the check of the value of \$200.00, with intent, him, the said prosecuting witness, "then and there to cheat and defraud of the same, contrary to the form of the statute." In discussing the information this court said:

"Every indictment or information is sufficient and good in law which charges the crime substantially in the language of the statute, subject only to those provisions of the national and state constitutions designed for the protection of life, liberty and property. * * * We think the language, when fairly considered, constitutes a positive and succinct averment that the property so designated was represented by the defendants to the prosecuting witness as the property of the designated corporation. This is equally true as to the positive nature of the language negating such representations. * * * It is further claimed that as the information fails to specifically charge loss or dam-

age to Bates, it is fatally defective. We think the offense under the statute, sec. 1849, R. S. 1908, is complete when a thing of value has been obtained knowingly and designedly from another, by false representations or pretenses, with an intent to cheat or defraud such person of such property, and that it is unnecessary to either prove or charge an actual pecuniary loss or damage. One may be actually defrauded without suffering pecuniary loss, and is so defrauded when he surrenders his property and receives for it, on account of false representations made to him, in order to obtain such property, something substantially different than he would have received had the representations in relation thereto been true. * * * In this respect an information is sufficient when it sets forth facts which show that the person whose property was obtained by such false representations suffered a legal injury in the above sense."

The informations in question definitely and clearly charge that defendant falsely, feloniously and knowingly pretended to the prosecuting witnesses that a certain tract of land was section 26, and open to government entry; that relying upon and being induced by these pretenses, which were false, each of them paid him \$300.00 for locating them upon the said section 26, which proved to be an entirely different tract from that shown them by defendant. Under section 1950, R. S. 1908, it is idle to assert that the informations do not state any offense or that they are not sufficiently specific as to the land claimed to have been shown to the prosecuting witnesses. The defendant having obtained their money by pretending that certain land was section 26, and part of the public domain, when it was not such section and was not open to public entry, it makes no difference, as matter of law, whether the prosecuting witnesses thereafter located on the real section 26, or whether they located on any government land at all. They were precluded from locating upon the tract shown them by defendant, who obtained their money by his knowingly false assurance that he could and would secure them the section

he showed them. This constitutes the offense described in section 1949, R. S. 1908.

It is alleged that the evidence was insufficient to establish the fact that defendant did show the two women any other land than section 26. The testimony upon this point is conflicting, and therefore the verdict of the jury will not be disturbed upon that ground, as there was ample testimony to support the verdict. Error is also predicated upon the sustaining of objections to certain testimony offered by the defense as to the location of the land shown to the prosecuting witnesses. The testimony offered was immaterial, and its rejection constitutes no error. A witness for the state testified concerning a similar transaction with defendant, whereby he was induced to pay defendant for locating him upon a certain tract of land, which later proved to be other than that which had been shown to him by defendant as being a certain section and township and open to entry. This testimony was admissible to show the intent of defendant, as the two transactions were so closely connected in time and so similar in character that a like motive and intent might fairly be imputed to each transaction.

Defendant contends that the testimony offered in rebuttal in relation to a furrow along the west side of Section 26-26-58 was prejudicial error, and that his motion for a new trial should have been sustained, because upon another trial he could prove that the furrow was there on April 6, 1916. His claim is that this testimony should have been introduced in the case in chief, and that its introduction in rebuttal was a surprise to the defense. The order of proof is largely a matter within the discretion of the trial court, and there was no abuse of discretion in this instance. The name of the witness who gave the testimony alleged to be a surprise was endorsed upon the information, and while this particular testimony may properly have belonged in the case in chief, its admission in rebuttal was in no sense prejudicial error.

Manifestly no prejudicial error has intervened, and upon the whole record it appears that the defendant has had a full, fair and impartial trial, that the verdict returned is right and the judgment entered upon it is free of error. It should therefore be affirmed, and it is so ordered.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

Decided May 6, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9242-9243.

GUNTER, ET AL., v. WALPOLE, ET AL.

1. PRECEDENT—*Effect.* Every judicial opinion is to be read in the light of the particular facts which the record presents.
2. MANDAMUS—*When Allowed.* The writ issues to an officer only when there is a clear legal right in the petitioner, and a clear legal duty to act on the part of the officer. The State Land Board offered for public sale only the surface of certain lands, reserving the mineral. This reservation was without authority of law. The application of the purchaser for mandamus to compel the conveyance both of the surface, and all below the surface, was denied, upon the ground that the State Land Board being without authority to sell the mere surface, the whole transaction was void.
3. EQUITY—*Cancellation of Contract.* An instrument void upon its face is harmless. Judicial cancellation is not necessary.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

Hon. LESLIE E. HUBBARD, Attorney General; Mr. FRANCIS E. BOUCK, Deputy Attorney General; Mr. WENDELL STEPHENS, for plaintiffs in error.

Mr. N. WALTER DIXON, Mr. FLOYD F. WALPOLE, Mr. THOMAS J. DIXON, Mr. NORTON MONTGOMERY, for defendants in error.

Mr. L. J. STARK, *Amicus Curiae.*

Mr. Justice Bailey delivered the opinion of the court.

THE trial court issued its writ of mandamus against the plaintiffs in error, who are the Governor, the Secretary of State, the State Board of Land Commissioners, and the Register thereof, to compel the execution and delivery to defendant in Error Kirchof, in compliance with section 5185, Revised Statutes of Colorado, a patent for certain lands in Weld County. A similar writ was directed to the same respondents commanding the issuance of a patent for certain other school lands to defendant in error Walpole, Collins and Dixon.

The two cases are alike in all substantial respects, they were tried together in the court below, and have been briefed, argued and submitted together here. The State Land sale whereon both causes of action are based was held on November 3rd, 1909, and is the same one which was incidentally involved in the case of *Walpole v. State Board of Land Commissioners*, 62 Colo. 554, 163 Pac. 849. In one of the two cases before us the purchaser was Kirchof, in the other Walpole, under whom Collins and Dixon claim by partial assignments of his certificate of purchase. For the sake of brevity we treat the two cases as one, and therefore use the term "purchaser" to denote Kirchof and Walpole interchangeably.

In the notice of sale, as well as in the certificate of purchase later issued, there had been inserted by the State Board a reservation of the minerals in and under the land. This is set out in full in the opinion in the Walpole case, *supra*. We held in the Walpole case that under the then existing law the State Board had no power to effect a separation of the surface from the lands offered for sale, by reserving or excepting the minerals from such lands, and the board was therefore enjoined from granting a lease upon the minerals attempted to be so reserved or excepted, which was the sole matter there in issue or determined. Notwithstanding the contention now made by the purchaser to the contrary, this court intended to, and did, refrain in that case from defining the exact status of the sale and

from finally determining the ultimate effect of the certificate of purchase should its validity be questioned by the State. Under a familiar rule the opinion there must be read to limit its expressions to the particular facts involved and to the point actually decided.

The reservation having been declared void, the question now is whether the sale itself can support the claim of the purchaser that he is entitled to exact by mandamus an absolute, unconditional patent, conveying not only the portion of the lands offered and bid for, that is, the lands without minerals, or in other words, the surface, but also the minerals below the surface. The purchaser has formally tendered the unpaid balance of the amount bid at the sale and has kept the tender good.

A mandamus writ cannot lawfully issue against an officer unless there is a clear legal right in the petitioner, and when a clear legal duty to act exists on the part of the officer proceeded against, and the writ will be effectual as a remedy. *People ex rel. v. Butler*, 24 Colo. 401, 404.

It is plausibly and forcibly argued on behalf of the purchaser that he has a contract with the State entitling him to a patent, the execution of which, under the official duty alleged to be thereby cast upon plaintiffs in error, can properly be compelled by mandamus. Authorities are cited by the purchaser which bear upon rights under private contracts and upon their enforcement. It is contended that by its legislation concerning State land sales the State has voluntarily subjected itself to the same rules of law as applied to private contractual dealings, and the implied inference is that this mandamus proceeding is equivalent to a suit for specific performance.

In its specified relief the remedy invoked in mandamus here may doubtless be considered, as the purchaser suggests, similar to an equity suit for specific performance, which latter usually involves the enforcement of purely private contract rights, while mandamus generally has for its object the performance of obligations arising out of an

official station or from such as are specifically imposed by law upon an officer. 19 Am. & Eng. Enc. Law, p. 722. (II. 8 e.)

If in this case the purchaser as petitioner in mandamus had any right, and the respondent officers had any duty, it could only be because the law in relation to State land sales, when applied to the facts before us, would impose such duty upon the officers, in favor of the purchaser, under what might be likened to a contract between the purchaser and the State, but existing only by virtue of a sale in substantial compliance with the law. Had the supposed contract been between private parties, however, and had the subject matter of the contract been something which under the law could not be sold, then a court of equity would not be justified in decreeing that a subject matter different from the one agreed upon be conveyed in lieu thereof, since the court may not make a new contract for the parties when they have failed to make a valid one themselves. Neither can the extraordinary remedy of mandamus be properly invoked for a similar purpose.

It is undisputed that what was offered for sale by the State Land Board was the surface only. That is all the purchaser bid for. We cannot say, as a matter of law, that the amount offered by the successful bidder, in the circumstances is the same as would have been paid if the land had been offered for sale in its entirety, undiminished by reservations or exceptions. There being no authority, in the absence of an enabling or validating statute, to sell the subject matter agreed upon by the State Board and the purchaser, it necessarily follows that there has been no valid sale or contract of sale upon which the purchaser can predicate a "clear legal right" in himself or a "clear legal duty" on the part of the officers. The transaction lacked compliance with substantial requirements in official procedure. It therefore was wanting in a feature which is as essential for mandamus purposes as for purposes of specific performance, namely, the "meeting of the minds" always a prime requisite to make an effectual contract.

The record shows conclusively that the lands for which patent is sought were not sold at public sale, according to the terms of the statute, inasmuch as what was purported to be offered and struck off to the purchaser was only the surface and consequently something incapable of being conveyed under the law as it then stood. There having been a failure to comply with substantial requirements by the State Board of Land Commissioners, the alleged sale is impotent for the purpose of affirmative judicial relief, and the granting of the writ of mandamus was erroneous.

After the decision in the Walpole case the State Board adopted an *ex parte* resolution declaring a cancellation of the certificate of purchase and providing for the refunding of moneys paid by the purchaser on account of the sale. The right of the board to do this is denied, and the question is argued at length on behalf of the purchaser, but under the view we have taken of the case the question becomes immaterial and need not be determined.

Attention is directed to the fact that the certificate, cancellation of which is complained of, plainly shows on its face the illegal subject matter of sale, which we consider conclusive against the position of the purchaser. Even if a certificate of purchase issued by the State Land Board be such an instrument as under some conditions would be a proper subject for cancellation in equity, a point which it is unnecessary now to decide, nevertheless it must be concluded that an instrument void on its face does not require cancellation by a court to render it harmless. 2 Black on Rescission and Cancellation, Sec. 651.

The judgment of the district court is reversed and the cases remanded with directions to dismiss the proceedings.

Decision *en banc*.

Mr. Justice Garrigues dissents.

Decided May 6, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9281.

KAROLY v. THE INDUSTRIAL COMMISSION ET AL.

1. **APPEAL AND ERROR**—*What may be Assigned for Error.* An injured workman was allowed by the Industrial Commission \$8.00 weekly. He afterwards petitioned for an allowance in gross. The Commission denied this application, apparently under the belief that the allowance was not authorized by the statute, but declaring further that it was not "for the interest of the parties." On petition of the workman to the District Court the same view of the statute was entertained, and solely upon this ground the petition was denied. *Held* that the ruling of the court in the construction of the statute was subject to review, notwithstanding the finding of fact, as to the interest of parties, by the Commission.
2. **STATUTES**—*Construction.* The Workmen's Compensation Act (Laws 1915 c. 179) is to be liberally construed.
3. **INDUSTRIAL COMMISSION**—*Authority.* Under sec. 57 of the Workmen's Compensation Act (Laws 1915 c. 179) the Commission have authority to award compensation in a lump sum to a workman who is totally and permanently disabled.

Error to the Denver District Court, Hon. Charles C. Butler, Judge.

Mr. G. W. MUSSER, Mr. JOHN T. MALEY, for plaintiff in error.

Mr. LESLIE E. HUBBARD, Attorney General; Mr. JOHN L. SCHWEIGERT, Assistant Attorney General, for The Industrial Commission of Colorado.

Mr. FRED HERRINGTON, for The Colorado Fuel & Iron Company.

Opinion by Mr. Justice Allen.

ON and prior to August 6, 1915, the plaintiff in error, Joe Karoly, was an employee of The Colorado Fuel and Iron Company, one of the defendants in error. On the date above named Joe Karoly was injured by an accident arising out of and in the course of his employment. The employee and employer, above named, were each subject to the com-

pensation provisions of the Workmen's Compensation Act (Chapter 179, Session Laws 1915). They were unable to come to an agreement in regard to compensation, and the employee applied for a hearing before the Industrial Commission. Such hearing was had in August, 1916. The commission found the facts above stated, and with respect to the accident and the injuries received, found

"* * * that while undermining a loose rock it fell upon him causing a fracture of the right radius, laceration of the right forearm and hand, fracture of the second and third lumbar vertebra, causing a marked deformity by protusion of the lower back at the site of the fracture, also causing permanent cystitis; that up to the present time the said injured employee is totally disabled."

The commission ordered that the company, which was carrying its own insurance, pay to Joe Karoly compensation at the rate of \$8 per week beginning with August 27, 1915, "and continuing throughout the period of his natural life or until such time as compensation shall cease" or the order be modified.

On or about the 18th of January, 1917, and after six months had elapsed from the date of the injury, the plaintiff in error filed before the commission his petition for payment in gross. The petition, after describing the claimant's injuries and condition, alleged, in substance, that he almost continuously suffers severe pains, and is totally and permanently disabled in consequence of his injuries; that he requires the attention of a physician every day; that he requires the care of an attendant to wait upon him, and medicine and appliances; that he should be in a hospital where such attention and care can be more readily and cheaply provided; and that such needs will continue for an indefinite time in the future. The petition further alleged that claimant has no money, property or means other than the \$8.00 per week which had been awarded by the commission, and no friends or relatives able to provide any more; that the weekly payment awarded him does

but little good, and is wholly insufficient to provide him with necessary food, clothing, physician's attention, medicine, and hospital care, and that as a result he is compelled to live with and endure pain and suffering, without even meager care. The plaintiff in error in his petition states that if he were paid a sum in gross he could then provide himself with the things which are reasonable and necessary for him on account of his disabled and injured condition, and prays that the commission order that he be paid such sum as to the commission may seem meet and proper, not less than \$8,500 in gross, or in such manner as the commission may determine.

This petition was heard by the commission on February 5, 1917, and on February 26, 1917, the commission ordered and adjudged that claimant's petition for a lump sum settlement should be denied. The order embodies brief findings of fact, from which it appears that the petition was denied upon two grounds. The commission found:

"That the extent of disability of the claimant cannot at this time be determined, for the reason that the claimant is suffering a permanent total disability, and in accordance with the Workmen's Compensation Act, and the award hereinabove mentioned, is to receive payment throughout his natural life, and it is humanly impossible at this time to determine the length of time which the claimant shall live.

* * *

"The commission further finds that it is not for the best interest of the parties concerned in this case to grant a lump sum in settlement, and that therefore, the claimant's petition for a lump sum settlement should be denied."

On March 30, 1917, the plaintiff in error filed in the District Court his complaint or petition to vacate the Industrial Commission's order of February 26, 1917, on the ground that the same is unlawful and unreasonable. The petition, in addition to asking that the order be set aside, prayed that the District Court enter judgment granting the petition for payment in gross and ordering payment

of a sum in gross of not less than \$8,500.00 or in payment of not less than \$40.00 per week.

The Industrial Commission answered and tendered to the court copies of its findings and awards, and its original record as to the remaining matters pertaining to the proceedings hereinbefore mentioned.

On August 30, 1917, the District Court, upon hearing, confirmed the commission's order of February 26, 1917. The claimant brings the case here for review.

The bill of exceptions clearly shows that the trial court based its decision entirely upon the theory that the provision of the Workmens' Compensation Act relating to payments in gross, being section 57, chapter 179, Session Laws 1915, "does not apply to cases of total permanent disability." The findings of the commission, accompanying its order of February 26, 1917, indicate that the commission also took this view of the law.

If such ground is an erroneous theory of the law as to the power of the commission to order payments in gross in cases of permanent total disability, the plaintiff in error was prejudiced by this error, even though the commission also denied his application for a lump sum settlement upon the ground that it would not be for the best interests of the parties concerned. *Matecny v. Vierling Steel Works*, 187 Ill. App. 448. This conclusion is further supported by the fact that the trial court disposed of the case entirely upon its construction of the statute, without determining whether it would confirm the order of the commission if the commission did possess the power to order a payment in gross in cases of this kind; and by the further fact that the commission made no definite findings showing the basis of their conclusion that "it is not for the best interests of the parties concerned" to grant the lump sum settlement, and made no definite and specific findings concerning claimant's condition, circumstances, and need of a lump sum payment.

The record, therefore, presents a question of law to be reviewed by this court, namely, whether section 57 of the Workmen's Compensation Act of 1915 applies to cases of permanent total disability, and gives the Industrial Commission the power to order payment in gross in such cases. The section in question provides that:

"Any time after six months have elapsed from the date of the injury, the commission may order payment in gross interest of the parties concerned. When payment in gross is ordered, the commission shall fix the gross amount to be paid based on the present worth of partial payments, considering interest at four per cent. per annum."

The purpose of this provision and of similar provisions in Workmen's Compensation Acts in other states is evident from the following language contained in *Roberts v. Tackney Co.*, 95 Kans. 723, 149 Pac. 413.

"The theory of the legislature manifestly was that cases would arise in which the condition of the employee would be so marked that there would be little reason to anticipate improvement in earning capacity and that the circumstances would be such as would warrant the court in giving judgment for a lump sum available at once, rather than for periodical payments as in an award."

See also 1 Honnold on Workmen's Compensation, Sec. 179, p. 653.

The Workmen's Compensation Act "is highly remedial, beneficent in purpose, and to be liberally construed." *Industrial Commission, et al. v. Johnson* (No. 9275), 172 Pac. 422. The court should not adopt such an interpretation of a statute as would produce absurd, unreasonable, unjust, or oppressive results, if such interpretation can be avoided. *Western Co. v. Golden*, 22 Colo. App. 209, 124 Pac. 584.

It is difficult to perceive what circumstances would warrant the payment of a lump sum to an injured employee whose disability is only partial or temporary, which circumstances would not also favor the payment of the lump sum to the employee if his disability were total and permanent. A workman who is permanently totally disabled is as much

entitled to the allowance of a gross sum as is any other injured workman. Section 57, hereinbefore quoted, should be construed, if possible, so as to apply to cases of permanent total disability, since such construction would prevent oppressive results, and at the same time be in accord with the policy and purposes of Workmen's Compensation legislation.

The plaintiff in error was awarded \$8.00 per week, and the commission found that he "is suffering a permanent total disability." If, as is possible if not also probable according to his petition, the plaintiff in error is or will be compelled to appeal to the public for aid, then one of the objects of the Workmen's Compensation Act will be defeated. The great object of such acts is to shift the burden of economic loss, resulting from these accidents and injuries, from the employee to the industry, and that the burden should be borne by the industry in which the injury occurred rather than by society as a whole. *State v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299, L. R. A. 1916 D 944, Ann. Cas. 1917 D, 1162. Furthermore, the intent of the act is to provide compensation for injured workmen, and circumstances may occur where the compensation would be more just, equitable, appropriate, and beneficial, if paid in a lump sum than if paid in small weekly installments.

In view of the foregoing observations, there is no reason for concluding that the legislature intended to exclude from the provisions of section 57 cases of permanent total disability, unless such intention appears from the language used, and it is plain that it does not so appear.

Counsel for defendants in error contend that section 57 is not applicable to cases of permanent total disability because the number of future partial payments cannot be ascertained. The argument is based upon the following cause in section 57:

"When payment in gross is ordered, the commission shall fix the gross amount to be paid based on the present worth of partial payments."

The result of this clause is that the commission can easily and accurately ascertain the amount of the gross payment in cases where the period during which partial payments are to be paid is fixed at a certain definite number of weeks. There is nothing in the clause, however, which prohibits or prevents the Industrial Commission from fixing a gross amount in cases where the periodical payments are to continue during the life of the injured employee. It is true that the exact number of such partial payments in the future, in such cases, cannot be ascertained. Nevertheless, the commission in the light of all the facts before it in a given case may make a reasonable estimate as to the probable number of such partial payments, and the probable duration of the claimant's life. The statute by necessary implication empowers the commission to do this, and to determine "the present worth of partial payments" whether the exact number of such payments can be ascertained or not. To hold otherwise would be to interpolate into section 57 an exception which is not there, and to exclude from the operation of that section cases where the injury has produced permanent total disability. An exception not made by the legislature cannot be read into the statute. (36 Cyc. 113, n. 88). It is not necessary upon this review to determine in what manner the commission may proceed in fixing the gross amount in cases of this kind, and on this subject no opinion is expressed.

For the reasons above given, the District Court was in error in holding that section 57 "does not apply to cases of total permanent disability," and in confirming the order of the Industrial Commission upon such ground. The plaintiff in error was entitled to have his case heard in the district court in the light of the correct interpretation of the law. The judgment of the District Court will, therefore, be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Decision en banc.

No. 8760.

COLORADO SPRINGS AND INTERURBAN RAILROAD COMPANY v.
KELLEY.

1. APPEAL AND ERROR—*Findings on Conflicting Evidence*, will not be disturbed.
2. STREET RAILWAY COMPANY—*Negligence in Operation*. Where one operating a railway car upon the streets of a city fails to give any warning or signal as he approaches a street crossing, or to look in the direction in which he is moving, he is guilty of inexcusable negligence.
3. NEW TRIAL—*Excessive Damages*. A lady of 24 years, and earning a salary of only \$40.00 per month, sustained, by the negligence of defendant, an injury resulting in an amputation of one of her lower limbs below the knee. She was awarded \$17,000 as damages. There was nothing in the record to evidence passion or prejudice on the part of the jury. The court refused to disturb the verdict, even though upon a former trial the award was but little more than one-half that in question.

Error to El Paso District Court, Hon. John E. Little, Judge.

Mr. SAMUEL H. KINSLEY, Messrs. CHINN & STRICKLER, for plaintiffs in error.

Messrs. ORR, ROBINETT & MASON, Mr. L. W. CUNNINGHAM, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THE defendant in error recovered a verdict and judgment against the plaintiff in error in the sum of \$17,000 as damages on account of personal injuries alleged to have been caused by the negligence of the tramway company. The case is before us for review upon two presented assignments of error, "That the damages awarded are excessive, appearing to have been given under the influence of passion and prejudice;" and that "The trial court erred in refusing to instruct the jury to return a verdict for the railway company, for the reason that the evidence was not sufficient to support any verdict and judgment for Mrs.

Kelley." The cause was before us upon a verdict and judgment in favor of the plaintiff, and was remanded for a new trial, because of certain instructions held to have been erroneous and prejudicial. *Colo. Springs Co. v. Engle*, 58 Colo. 352, 147 Pac. 666.

In the vicinity of the accident the Railway Company operated two lines of track, crossing at right angles at the intersection of Pike's Peak avenue and Tejon street, in Colorado Springs. Pike's Peak avenue runs east and west; Tejon street runs north and south; both are unusually wide streets. At this point of intersection the railway company operates a double track north and south on Tejon street. On Pike's Peak avenue, it operates but one track and all cars run west, returning easterly by another street. At a point near the east side of Tejon street, a line of cars leaves Pike's Peak avenue and turns south on Tejon street. So that whether a car be one which is to proceed westward from the intersection along Pike's Peak, or whether it be one that is to turn south on Tejon street, both proceed along the single track westward to a point near the east side of Tejon street, and apparently stop before proceeding further on either street. Admittedly this intersection of these two streets is a busy, if not the busiest, in the city, for street car, vehicle and pedestrian traffic.

The testimony is in agreement that a violent windstorm was prevailing at the time of the accident, with the air so filled with dust and sand as to make it quite difficult to see with any degree of clearness for an appreciable distance, and the wind was blowing with such velocity as to make it difficult also for a pedestrian to proceed against it.

The plaintiff started from a point on the south side of Pike's Peak avenue, on the crossing on the west side of Tejon street, proceeded along the crossing toward the north side of Pike's Peak avenue, and when on the track was struck and injured by the car in question, which was not a passenger car, but a large and heavy water car used for sprinkling the streets.

We think there was sufficient evidence to clearly justify the jury in the finding of negligence in the operation of the car and also that the jury was likewise justified in finding no sufficient proof of contributory negligence, and therefore under the settled rule of this court these findings will not be disturbed.

It will serve no good purpose to discuss the law in such cases, as repeated decisions of this court seem to have well covered every phase of it, and in harmony with the very complete instructions of the court covering the subject, and against which no error is assigned.

The relative rights, duties and obligations of carriers, street car companies, travelers, and pedestrians upon streets and at street car crossings, will be found quite fully discussed in the following cases: *Nichols v. B. & Q. R. A. Co.*, 44 Colo. 501; 98 Pac. 808; *Denver Tramway Co. v. Carson*, 21 Colo. App. 604; *Denver Tramway Co. v. Gustafson*, 21 Colo. App. 478, 123 Pac. 680; *Denver Tramway Co. v. Martin*, 44 Colo. 324, 98 Pac. 836; *Philbin v. Denver Tramway Co.*, 36 Colo. 331, 85 Pac. 630; *Phillips, et al. v. Denver Tramway Co.*, 53 Colo. 458, 128 Pac. 460, Ann Cas. 1914 B, 29; *Denver Tramway Co. v. Wright*, 47 Colo. 366, 107 Pac. 1074; *Denver Tramway Co. v. Brown*, 57 Colo. 484, 143 Pac. 364.

It is however contended that the plaintiff had stopped within a few feet of the track, as if waiting for the car to pass before attempting to cross, and that the motorman thus had a right to rely on the presumption that she would not incur the danger. But this is not justified by the testimony.

The motorman, witness for the defendant, testified to the contrary. He said: "I did not see her before she was within five or six feet of the track. At the time I noticed her she was in motion, going north, while she was under my observation she didn't exactly stop but hesitated."

The testimony is overwhelming that she did not stop except as she may have been swayed by the strong wind

against which she was walking. It is true that the plaintiff did say that she stopped, but in further testimony she explained that "I hesitated and I had to get hold of my hat, and my clothes were blowing; it seemed to be a sudden bad spell, a regular whirlwind." This last testimony is corroborated by that of other witnesses.

The plaintiff testifies that at the time she started from the curbing she looked and saw a car on the east side of Tejon street, but did not know whether or not it was the car that struck her; that she continued to look and listen while attempting to cross the street, but did not see or hear anything to indicate its movement until she was struck. The court fully advised the jury as to the rule of law in this regard, in the following instruction:

"You are instructed that if you find from a preponderance of the evidence that the plaintiff, just before stepping upon the tracks of the defendant company, stopped and looked in the direction of the water car of the defendant, and that under the circumstances a reasonably prudent person in the exercise of ordinary care operating said car would have a right to believe from said acts of plaintiff that she had seen said car approaching and did not intend to step upon said tracks until after said car had approached a point opposite which she was standing, then the defendant company was under no obligation to slacken the speed of its said car, and that those in charge of the car had a right to permit it to continue in a westerly direction without stopping it until such time as in the exercise of ordinary care those in charge of the car knew or should have known that the plaintiff was about to place herself in a position of danger, by stepping on said tracks, or so near thereto that the car could not pass without striking her, and the person operating said car was then able by means of the appliances with which it was equipped to have avoided striking the plaintiff."

It is plain that notwithstanding the wind and dust storm, and the time of day when many pedestrians might reason-

ably be expected to be crossing the street, no gong was sounded nor other warning given, or if so then not in time to give effective warning, and the jury was justified in finding from the evidence that the motorman was not himself looking in the direction he was going until it was too late to avoid the accident. His negligence in this respect appears to be inexcusable, if not culpable. It is true that in this case as in like cases generally, there is conflict in the evidence, but this must be solved by the jury and not by the court. The testimony in this case does not justify the application of the rule so rarely exercised, whereby a jury's findings of fact may be disturbed.

As relates to the contention of excessive damage, we must bear in mind and be governed by the rule laid down by Chancellor Kent more than a century since, and generally adhered to by all courts, and by this court; that it is exclusively the province of the jury to estimate and assess the damages, and that the amount to be allowed in such cases, rests largely in their sound discretion. He said:

"The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partially or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say, that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries."

And as was well said by Justice Story in *Thurston v. Martin*, 5 Mason 497, Fed. Cas. No. 14018:

"It is one thing for a court to administer its own measure of damages in a case properly before it, and quite an-

other thing to set aside the verdict of a jury because it exceeds that measure."

No case has been cited from this court and we know of none, wherein there has been a departure from the rule stated.

Counsel cite *Tunnel Mining Co. v. Cooper*, 50 Colo. 400, to sustain their contention that the damage is excessive. But that case is not in point except it be to sustain the general rule. There was no evidence to show that Cooper had been maimed, or even permanently injured, and the verdict was for \$38,750. This verdict under the circumstances was clearly "so outrageous as to strike every one with its enormity and injustice, and to induce the court to believe that the jury must have acted from prejudice, partiality or corruption." It was so outrageous that the trial court refused to sanction it and compelled the party to either remit nearly three-fourths of it, or submit to a new trial. And this court rightfully held that the entire verdict was vitiated because of the finding of the trial court that the verdict was rendered under the influence of passion or prejudice.

But there is no such finding here, nor is there any evidence of passion or prejudice, or that the amount of the award was other than the honest and combined judgment of the jurors. The trial court refused to disturb the award, and therefore sanctioned it.

It may seem to be a large amount, perhaps larger than the average in similar cases, though it does not stand out as an exception, nor even unusual. It may have been greater than the trial court would have awarded, or greater than this court would have felt justified in giving. But the power to make the award was within the constitutional and exclusive province of the jury, and courts may not invade that power, nor disturb it, except for injustice manifestly appearing.

Counsel urge that a smaller award was given on the former trial being slightly more than half; that it is greater than the average in similar cases; and that the interest on the amount would be greater than the salary the plaintiff was earning at the time.

While these matters may be considered in reaching a conclusion, yet neither, nor all of such considerations together, are controlling. There is yet to be considered physical pain; mental suffering, past and future; incapacity for many activities; life expectancy; occupation, and in this case the fact that plaintiff was maimed in such manner as to be handicapped for life.

The plaintiff was at the time a young woman twenty-four years of age, her foot and ankle were so crushed as to necessitate amputation of the leg just below the knee. It is true that she was at the time earning but forty dollars per month, as a stenographer, but it cannot be said that this must mark her earning power throughout her life, while it may be considered as a factor in making the award. We cannot say that the award was not the result of the serious consideration and honest judgment of the jury.

The judgment is affirmed.

En banc.

Garrigues, Failey and White, JJ., dissent.

Decided June 5, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9020.

UNITED STATES CASUALTY COMPANY v. ELLISON.

Passenger—Who is—Contract Construed.—Action upon a policy against accidents sustained “while the insured is a passenger in a public conveyance provided by a common carrier for passenger service.” Plaintiff was the attorney of a railway company, but enjoyed other clients, and maintained an office separate from that of the company. At the time of the injury he was riding in a railway auto car operated by the railway

company partly for the accommodation of its officials and partly for the carriage of passengers for hire, and was traveling upon a free pass, partly upon the business of the railway company, and partly upon the business of other clients. *Held* that he was a passenger within the meaning of the policy.

Error to El Paso District Court, Hon. W. S. Morris, Judge.

Mr. R. L. HOLLAND, Mr. GEORGE W. BIERBAUER, for plaintiff in error.

Mr. IRA HARRIS, Mr. ROBERT S. ELLISON, for defendant in error.

Opinion by Mr. Justice Teller.

PLAINTIFF in error seeks to reverse a judgment against it, rendered in an action by defendant in error on an accident insurance policy.

The policy covered injury sustained "while the insured was a passenger and was in or on a public conveyance provided by a common carrier for passenger service," and the case turns upon the question of whether or not plaintiff's injury was sustained under the conditions thus stated.

It appears that, some weeks before plaintiff was injured, the railroad company, which operated the line between Colorado Springs and Cripple Creek, put in operation on said line an automobile rebuilt so as to run on the rails. Defendant in error was attorney for said company, on a salary, but not devoting his time exclusively to the company's business, and having offices apart from the company's offices. On the day of the accident, he boarded this automobile at Colorado Springs to go to Cripple Creek, to attend to some business for the railroad company, and for one or two other clients. When the car was within the limits of Cripple Creek, it was run into by a freight engine, and the defendant in error was thrown out, and seriously injured.

For the plaintiff in error it is contended that the injury was not sustained in the manner which the policy prescribes as a condition of recovery, for the reason, first, that

the railroad company was not at the time acting as a common carrier in operating the motor car, and, second, because said car was not at the time a public conveyance. It is also urged that defendant in error was an employee of the company, and not a passenger.

The cause was tried to the court, and evidence was introduced on both sides as to the use of the motor car, its mode of operation, etc. There was no substantial conflict on these matters, the evidence showing that, although the car was used largely for the convenience of the officers of the company, it was used also for the conveyance of passengers for hire. The evidence was sufficient to support the court's finding against defendant on both of these points.

It is not material that defendant in error was traveling on a pass issued by the company, since that fact did not change his status as a passenger, nor relieve the company of its duty to him as a passenger. This point is too well settled to require the citation of authorities.

Cases are cited to support the contention that defendant in error was an employee of the company, and hence not a passenger, but they do not apply to the facts in this case. While attorneys have in some cases been held to come within the term "employees," when, in court orders, etc., it clearly appeared that such was the intent, the cases are numerous in which it has been held that attorneys are not employees in the ordinary sense of that term.

Defendant in error was on his way to Cripple Creek on business of his profession, and the fact that a part of that business was for the railroad company did not make him any the less a passenger on the Company's car while en route to the point where he was to transact such business.

We are of the opinion that the case was correctly determined, and the judgment is accordingly affirmed.

Judgment Affirmed.

Upon petition for rehearing Mr. Justice White withdraws his concurrence in department opinion heretofore an-

nounced. That opinion is therefore withdrawn and this opinion of the court *en banc* substituted in lieu thereof.

Mr. Justice White dissenting.

Decided June 3, A. D. 1918. Rehearing denied December, 2, A. D. 1918.

No. 8927.

VAN GILDER v. KINGSBERRY.

ACCIDENT INSURANCE—Policy Construed. An accident policy provided that the insurer would pay the insured "the respective indemnities set forth for loss resulting from accident in the principal sum of \$100.00, with accident indemnity at \$45.00 per month."

By clause A, it was provided that the insurer will pay ". . . for loss of either foot, one-half the principal sum;" and by clause B, that the insurer should pay "for the total loss of time \$45.00 per month, for not exceeding 104 weeks." Held that the insured having lost a foot was entitled to recover only one-half the principal sum, as prescribed in clause A. A judgment allowing an award for time lost, under clause B, was reversed.

Error to Denver District Court, Hon. John H. Denison, Judge.

Mr. D. J. DAVIES, for plaintiff in error.

Mr. W. S. PALMER, Mr. EWING ROBINSON, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS is an action to recover indemnity under a contract of accident insurance. Trial was to the court, with findings and judgment for plaintiff. Defendant alleges error and brings the case here for review. The parties are designated as in the trial court.

The policy issued by defendant to plaintiff was in the principal sum of \$100.00, with a monthly indemnity of \$45 for total disability. It provided, in the event the insured sustained personal bodily injury through violent and

accidental means, that the company should pay for specific losses as follows:

"(A) For any one of the following specific losses which shall result solely from such injuries within 90 days from date of accident in lieu of any other indemnity. For Loss of Either Foot * * * One-Half Principal Sum."

Paragraph (B) provided for payment of an indemnity of \$45.00 per month for total disability; and paragraph (C) for a less payment for partial disability. Paragraph (M) contained the following provisions:

"(M) In event of a loss hereinbefore designated as a "Specific Loss," no claim shall exist for compensation other than that specifically provided for such total loss."

During the life of the policy plaintiff met with an accident which resulted in the loss of his left foot above the ankle, and upon the theory that the contract of insurance provided for a monthly indemnity under paragraph (B) and also an indemnity for the loss of his foot under paragraph (A) he brought suit to recover on both. After hearing testimony the court found for plaintiff in the sum of \$624.00, and rendered judgment accordingly.

There are several assignments of error and cross-errors, but the only question which need be decided is whether the policy provided for disability indemnity when such disability is caused solely by some specific injury for which a fixed and definite payment is provided. In other words, plaintiff seeks to recover one-half of the principal sum of his policy for loss of his foot, and also a monthly payment as disability indemnity resulting from such loss.

His right to recover for the loss of his foot is given in paragraph (A), *supra*, wherein it is provided that for such specific loss the insurer will pay one-half the principal sum "in lieu of any other indemnity." It is impossible to more clearly set forth the agreement that in event of the loss of a foot by plaintiff, the insurer would be liable only for the specific indemnity provided therefor. In addition, however, as if to place matter beyond all possible doubt, sub-

division (M) of the policy provides that for any loss designated in the policy as a "specific loss," the compensation shall be only that specifically provided for such loss. This is in effect a restatement of the provision of paragraph (A), *supra*, that in the event of a loss of either foot the compensation paid shall be "in lieu of any other indemnity."

The only meaning to be given the terms of the policy is that in the event of a specific loss, as set out in paragraph (A), *supra*, the insurer is liable only for the sum therein definitely agreed upon. No additional indemnity can be recovered for total or partial disability arising out of such specific injury. The contract plainly and clearly so provides. *Employers' Liability Assurance Corporation, Ltd., v. Morrow*, 143 Fed. 750, 74 C. C. A. 640; *Cunningham v. Union Casualty & Surety Co.*, 82 Mo. App. 607.

The authority cited by plaintiff in support of his claim for both specific loss and disability indemnity is *Rabb v. North American Accident Insurance Company*, 28 Idaho, 321, which case, however, is squarely against his contention, as it determines that where the insured receives no injury other than the one for which a specific indemnity is named, he may recover such indemnity only, although he is not precluded from claiming for other disability also, if it arises from injuries other than that resulting in the particular one for which a specific indemnity is provided.

In the case at bar plaintiff does not claim that he suffered any injury other than the loss of his foot, and for this it is plain that he can only recover the specific indemnity provided in paragraph (A) of the contract. Such is the agreement which the parties made. The court cannot make a new or different one, but has only to uphold and enforce the one which the parties voluntarily entered into, the meaning of which in this case is clear, definite and undoubted.

The judgment of the trial court is reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

Judgment reversed and cause remanded.

Decision *en banc*.

Mr. Justice Allen dissents.

Decided June 3, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9035.

**BESSEMER IRRIGATING COMPANY v. WEST PUEBLO DITCH
AND RESERVOIR COMPANY.**

1. **WATER RIGHTS—Adjudication of Priorities—Amendment of Record—Limitation.** An action brought to correct a clerical error in the record of an adjudication decree, by which it appears that priority was awarded as of a date years prior to that anywhere claimed by the appropriator, in the adjudication proceedings, is not barred by the four years limitation (Rev. Stat. sec. 3313).
2. **JUDGMENT—Record—Clerical Mistakes in,** may be corrected at any time.
3. — **Evidence of Mistake.** The mistake may be established by any pertinent and satisfactory evidence, parol or otherwise.

Error to Pueblo District Court, Hon. C. S. Essex, Judge.

Mr. FRED A. SABIN, for plaintiff in error.

Mr. S. S. PACKARD, Mr. LESLIE E. HUBBARD, Mr. RALPH E. C. KERWIN, for defendant in Error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was brought in the District Court of Pueblo County by The Bessemer Irrigation Ditch Company, plaintiff, against The West Pueblo Ditch & Reservoir Company, defendant, to correct an alleged clerical error in a decree entered by that court, in a water adjudication in Water District No. 14. The matter complained of is the giving to The West Pueblo Ditch Extension a priority of date December 17, 1877, when it should, as is claimed, have been for the year 1887. Findings and judgment were for defendant, and plaintiff brings the cause here for review.

Defendant relies upon the statutory provision that after

four years all parties affected are deemed to have acquiesced in water decrees, and that therefore plaintiff is now barred from setting up any adverse claim, that statute having run against it. It appears, however, that this suit is not to alter or amend a decree, but to decide the question whether, in order to make the record speak the truth, a judgment or decree may be corrected to make it what it purports to be, the conclusion of law upon facts found or admitted.

It is urged by plaintiff that nowhere in the record is there any claim to a priority of 1877 for this right, and that such date so far as it relates to this ditch appears but in one place in the record, and that in the decree itself the referee found that the construction of the ditch was begun in 1887 and water applied in that year; and that in fact the court decreed a priority as of date 1877, it having specifically adopted the findings of the referee.

The rule as to correction of errors in decrees and judgments is stated in 23 Cyc. 864, as follows:

"A mere clerical error arising from inadvertence or the formal misprison of clerks or other officers may always be corrected by the court, so as to make the judgment speak the truth, even after the term. The term "clerical error" as here used must not be taken in too narrow a sense. It includes not only errors made by the clerk in entering the judgment, but also those mistakes apparent on the face of the record, whether made by the court or counsel during the progress of the case, which cannot reasonably be attributed to the exercise of judicial consideration or discretion."

In reference to the same subject, 15 R. C. L. 679, reads thus:

"Hence, although a court is without power generally to alter or amend final judgments after the close of the term at which they were rendered, it may after the expiration of the term of court make amendments of the record of judgments so as to correct errors, mistakes or misprisons

of clerks, or other officers of the court, inadvertencies of counsel, or to supply defects or omissions in the record."

In *Doane, et al. v. Glenn, et al.*, 1 Colo. 454, in discussing the question of whether the record of a case might be amended after the term, this court, at page 456, said:

"Yet, notwithstanding what has been said above, the doctrine in this country, in reference to amendment of records, may be said to have crystalized into the following legal proposition, namely: That any error or defect in a record which occurs through the act of omission of the clerk of the court in entering or failing to enter, or record its judgments or proceedings, and is not an error in the express judgment pronounced by the court in the exercise of its judicial discretion, is a mere *clerical error*, and amendable, no matter in how important a part of the record it may be; and when the error or defect is in respect to the entry of some judgment, order or decree or proceeding to which one of the parties in the cause was of right entitled, as a matter of course, according to law and established practice of the court, it will sometimes be presumed to have occurred through the misprison of the clerk, and will always be amendable, if, from some other part of the record, or from other convincing and satisfactory proofs, it can be clearly ascertained what judgment, order or decree the party was entitled to; nor is it necessary, so far as clerical errors go, that the amendment should be made during the term at which judgment was rendered."

In passing upon the refusal of a petition to correct a mistake in the record of a case this court, in *Pleyte v. Pleyte*, 15 Colo. 44, at page 47, 24 Pac. 580, said:

"We think the application should have been allowed. The reason given by the learned judge for his denial thereof—that because the relief was not asked within six months after adjournment of the term, as provided in section 75, Code of Civil Procedure, the court was without jurisdiction to grant the request—is not good. That provision was not intended to control such matters as are here presented

It affects judicial action and does not deal with mere clerical mistakes * * * courts may correct the clerical misprisons of their clerks or other officers, when properly brought to their attention * * * 'All courts have inherent power to correct clerical errors at any time.' *Freem. Judgm.* sec. 71, and cases cited."

In *Gaynor and Stanley v. Clements*, 16 Colo. 209, 26 Pac. 324, this court of its own motion, took notice that a clerical error had been made in the record of the judgment of the lower court, and at page 213 said:

"* * * The entry of the judgment was a clerical mistake or misprison of the clerk, amendable at common law as well as under the statute of *jeofails*. A judgment is a judicial act; it is what is considered and ordered by the court, and not necessarily what is entered by the clerk. *Freeman on Judgments*, secs. 36, 40; *Moreland v. Ruffin*, 1 Ala. 18."

The Court of Appeals of this state speaking to the same question in *Breen v. Booth*, 6 Colo. App. 140, at page 142, says (40 Pac. 194):

"The right of a court to have its judgments entered as they are given, and where, through clerical misprison the entries are incorrectly made, to have them corrected so as to express the truth, is too well established to require a citation of authorities. The judgment of the court is that which it pronounces. The record entry is not itself the judgment, but rather the evidence of the judgment, or its embodiment in invisible and permanent form; and the court, in virtue of the same authority by which it pronounces its judgment, can cause the record to express it as it was given, or change an inaccurate record into a true one. And it is immaterial in what the inaccuracy consists, or how far the entry may deviate from the judgment rendered."

It is clear from the authorities quoted that misprisons and clerical errors in the record of a cause may be corrected at any time they can be shown to exist. In the case at bar plaintiff offered to prove by the clerk who made the

entry, and the referee who suggested the decree in question to the court, that the clerical error existed as claimed, and that the date actually suggested for the priority in question was 1887. Plaintiff also offered to introduce other record testimony to show that no claim for a priority other than of 1887 had ever been made by defendant, and that there are no facts in existence upon which it is or was reasonably possible to award a priority to it as of date December 17th, 1877. Proof was offered also that the decree had been administered as one of 1887 until 1912, and that no claim for a priority of 1877 was ever made until 1912. Other evidence, tending to support the contention of plaintiff that the dating of the priority as of 1877 was a clerical error, was offered and refused.

It is the rule here that the existence of an error as alleged in this case may be established by any pertinent, satisfactory evidence, parol or otherwise. In *People ex rel Schmidt v. County Court of Arapahos County*, 9 Colo. 41, 47 Pac. 469, it is said:

"It is clearly settled that the trial court may proceed on evidence satisfactory to itself, whether oral or documentary, whether of record or otherwise, to correct the entry and make it speak the judgment which the court in fact rendered. This matter has been set at rest by the Supreme Court of this state, which is in line with the authorities of many other states on the same question. *Doane et al. v. Glenn*, 1 Colo. 454; *Freeman on Judgments*, sec. 63; *Clark v. Lamb*, 8 Pick. 414, 19 Am. Dec. 332; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, 82 Id. 172; *Weed v. Weed*, 25 Conn. 336; *Rugg v. Parker*, 7 Gray 172; *In re Wright, Petitioner*, 134 U. S. 136, 33 L. Ed. 865, 10 Sup. Ct. 487. These authorities broadly support the power of the court to amend its record and rest its action on proof which shall be sufficient in its judgment to demonstrate the error inherent in the record."

And in *Pleyte v. Pleyte*, supra, it is said on page 47:

"Nor, according to the modern and more liberal rule, is

the proof required to justify such amendment limited to any particular or specific kind. 'At the hearing such evidence is required as would be competent in any other investigation.' "

This rule as to admission of parol and other satisfactory evidence under such circumstances is approved in the following cases: *Arrington v. Conrey*, 17 Ark. 100; *Weed v. Weed*, 25 Conn. 337; *Shaw v. Newsom*, 78 Ind. 335; *McConnell v. Avey*, 117 Iowa 282, 90 N. W. 604; *Parkhurst v. Citizens' Nat. Bank*, 61 Md. 254; *Harris v. Jennings*, 64 Neb. 80, 89 N. W. 625, 97 Am. St. Rep. 635; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; *State v. Swepton*, 83 N. C. 584; *Hollister v. Judges*, 8 Ohio St. 201, 70 Am. Dec. 100.

Under the rule announced, it was prejudicial error to exclude testimony which *prima facie* conclusively established the fact that there was a clerical error in the record, which changed the whole intent and effect of the decree. Under such circumstances it became the duty of the trial court to admit and consider all pertinent testimony offered to establish the date actually suggested by the referee and adopted by the court in fixing the priority of the defendant. If by such evidence the court is satisfactorily convinced that the date settled upon and intended in the adjudication was other than that shown by the decree as entered, the record should be amended, and made to speak the truth and show the judgment of the court which was actually pronounced.

The judgment is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

Decided June 3, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9054.

MCGOWAN ET AL. v. LOCKWOOD ET AL.

1. **DEEDS—Delivery.** The voluntary delivery of a conveyance of lands by the grantor to the grantee is effectual, though the grantee is not, at the time, informed of the contents or purpose of the paper so delivered.
2. — **Acceptance,** by the grantee is presumed where the delivery is unconditional, and the conveyance beneficial.

Error to Denver District Court, Hon. John A. Perry, Judge.

Mr. HUGH MCLEAN, Mr. E. E. SCHLOSSER, for plaintiffs in error.

Mr. E. E. WHITTED, Mr. L. B. BURROW, for defendants in error.

Mr. Justice Scott delivered the opinion of the court.

THIS action by plaintiff in error, plaintiff below, is in form to quiet title to certain lots, upon two of which is situated the dwelling house in which the plaintiff and his deceased wife lived at the time of her death, and two other lots in the city of Denver. The cause was tried to the court and judgment rendered against the plaintiff, who brings the case here for review.

There is no conflict in the testimony as to any material fact in the case.

It appears that the plaintiff, Henry McGowan, married Emergene McGowan, his deceased wife, in 1876, and they lived together until the time of her death. At the time of their marriage Mrs. McGowan was the mother of two girls by a former marriage, since married, and now Lodena Lockwood and Estella O'Grady, then living in distant states—the latter now deceased—but both living at the time of the death of their mother. The plaintiff can neither read or write, except to sign his name. Mrs. McGowan died November 8th, 1904. At the time of her death the title to the lots in question was standing in her name. The lots upon which the dwelling is situated were purchased by

the plaintiff, and the deed taken in his own name December 29th, 1888. He conveyed the lots to his wife April 18th, 1894.

McGowan constructed the dwelling on the lots, and at the time of the commencement of it, he had \$1,700.00 in the bank, which was used for that purpose, and he did much of the labor on it personally. He testified that, "we kept but one pocketbook in our house. I didn't know when I had a suit of clothes or a shirt. She bought all my clothes. She bought the coal and done the business, and I gave her my money, and she took good care of me." So far as the record discloses, their family life appears to have been ideal. The following unquestioned testimony from the plaintiff best shows the relationship between these two, as going to the question of intent in the matter of the conveyance here in dispute.

"In 1888 I got a deed to this property from a man by the name of Clayton. My wife and I went up to Leonard & Montgomery's office, and we paid three hundred dollars cash, and he took one and two-year notes for the rest. I trusted to my wife.

I got a patent for the ranch in Weld County from the government. I never dealt in real estate. These are the only lots I ever bought in my life.

I proved up on the land in Weld County according to law, and I got a patent. I believed the patent came to the house addressed to me. It was in my name. My wife opened the envelope. She opened all the mail that came to me. She done the business, really, because she had an education and I trusted to her. My wife didn't work and earn her own money all the time. We had a little girl, and she was about four years old when she died, and she didn't work during that time; and then again about three years before she died she didn't work. She went East twice, she was sick; and then she sent about five hundred dollars of her earnings to take this Mrs. O'Grady from Australia."

Mrs. McGowan became severely ill several weeks before her death, and on the 15th day of October, 1904, or about three weeks prior to her death, sent for a notary public and executed a quit claim to her husband for the premises involved. The consideration being "the love and affection she bears toward her husband, Henry McGowan." This was without the knowledge of plaintiff.

Plaintiff testifies that three or four days before her death, and just after he had telegraphed her daughters as to her condition, he entered her room and she said: "Henry, I am never going to get off this bed." 'Well,' says I, 'I have seen you through three or four bad spells, and I think you will pull through this.' 'Now,' she says, 'go to the closet, in the stocking bag, there is a hundred or ninety dollars,' I couldn't say which, 'and take that down and put it in the tool chest, but don't carry it down town.' She says, 'there is a great many coming in and out here, and I can't watch them; and go to that cupboard there and get me the envelope, a big envelope,' she says. I did, and under the bottom drawer was a secret drawer, and I did, and she looked at it, and she says, 'That is not the one,' she says, 'Get the one with the blue cover.' I done it, and she looked at it, and she says, 'That is the one. Put that down in your tool chest and lock it; put the key in your pocket.' She says, 'You know the girls don't like you.'

He says that she did not tell him what was in the envelope, and that he did not know until about three months afterward, when he asked a Mr. Hart, who had written letters for him, to examine the paper, and who advised him that it was a deed from his wife to him for the premises involved, and that this was his first knowledge that the paper contained in the envelope was a deed to him. This is corroborated by Hart.

Jesse Crook, the notary public who took her acknowledgment, testifies that Mrs. McGowan said at the time, in addition to formal statements, that she wanted the home to go to Mr. McGowan.

Mrs. LaBrie testified that she lived as a neighbor to the McGowans for six years prior to Mrs. McGowan's death; that in June, 1904, she had a conversation with Mrs. McGowan about the property, and again about three or four weeks before she died, in which she said she was going to make a deed for it to Mr. McGowan, and at a later date, in which she said she had fixed it all up.

A few days after Mrs. McGowan's death the two daughters and McGowan proceeded to the office of Mr. Schlosser, an attorney, where a deed was made by the sisters to McGowan, giving him a life interest in the property, and also when McGowan executed a deed to the sisters for his farm in Weld County, reserving a life estate. This seems to have been done at the instigation of the defendant, Lodema Lockwood, who insisted that this was the desire of the deceased wife. McGowan at that time had no knowledge that the paper in his possession was a deed to him for the premises.

Schlosser, the attorney who drew and acknowledged these instruments, says he was not acquainted with McGowan at the time and was introduced by Mrs. Lockwood; that Mrs. Lockwood did all the talking. Schlosser further testified:

"They (the sisters) seemed to be so much pleased with it, with the understanding, that they wanted it the way Mr. McGowan apparently consented to. I don't think Mr. McGowan understood the provision. He really wasn't conscious of it. That is my impression after learning subsequent facts. At that time, I think we didn't talk it all over in common, nothing more than the bare statement as they explained to me; I didn't have an opportunity of examining anything."

It is clear that Mrs. Lockwood and her sister had no inheritable interest in the Weld County land, for the title was in McGowan under a patent from the government.

It is plain that these daughters, through Mrs. Lockwood, were attempting to secure title to both properties, under the plea that such was the desire of Mrs. McGowan before

her death; at a time when he was without knowledge as to the deed, in ignorance of legal forms, and when he was suffering from grief because of her death.

Mrs. Lockwood testified on the trial that sometime prior to her mother's death, the mother told her that she wanted the property to go to the sisters, but to the use of McGowan during his lifetime. But this in no sense negatives the fact that the deceased woman deliberately executed the deed at her own instigation, and delivered it to McGowan, with instruction to lock it up in his tool chest.

There is not a scintilla of testimony in the case to indicate that there was any condition placed upon the delivery of the deed or that such delivery was not intended to be present, absolute and final.

The testimony of Mrs. Lockwood and others is that Mrs. McGowan's mind was clear at all times mentioned. The fact that she had repeatedly expressed her intention to convey the property to her husband; caused the deed to be drawn and executed it properly, and at the time expressed her purpose to the notary; delivered it to her husband, saying at the time that she could not live; instructing him to lock it in his tool chest, to which he alone had the key, forces the irresistible and legitimate conclusion that it was intended as an absolute and present delivery to the grantee. The only question to be determined is whether or not there was a lawful delivery.

The court did not find any fact contrary to or in conflict with the above statement of the testimony. It is clear that the ruling of the court was in effect that the delivery of the deed under the circumstances was such as in law did not pass the title to the property.

After McGowan discovered that he had a deed for the property, he caused a letter to be written to Mrs. Lockwood, advising her of the fact, and proposing a compromise, to the effect that if the sisters would reconvey his Weld County land to him, he would agree to permit title to the house and lots to remain in them, subject to a life interest in him.

This correspondence is referred to frequently in the testimony, and seems to have continued, but resulted in a refusal by Mrs. Lockwood, and after a period of about three years the deed from his wife was recorded, and later this suit instituted.

We think that under the law in this jurisdiction as announced in the case of *Walker v. Green*, 23 Colo. App. 154, 128 Pac. 855, there was a lawful delivery of the deed in question, and that it constituted a valid conveyance. Gathered from this decision is the following statement of controlling legal principles:

"The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed. The doctrine seems to be settled beyond reasonable doubt, remarks Justice Atwater, 'that where a party executes and acknowledges a deed, and afterward, by acts or words, expresses a will that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it should be sufficient to convey the estate, although the deed remains in the hands of the grantor. The main thing which the law looks at is whether the grantor indicates his will that the instrument shall pass into the possession of the grantee, and if that will is manifest, then the conveyance enures as a valid grant, although, as above stated, it never comes into the hands of the grantee (p. 159). * * * The intent to convey is evidenced by the fact of making out and duly acknowledging a deed. The delivery may be evidenced by any act of the grantor by which the control or dominion or use of the deed is made available to the grantee."

When we consider the life relationship of the parties, there does not remain a reasonable doubt of the intention of Mrs. McGowan to convey absolutely the property to her husband. He was a carpenter, who industriously worked at his trade, turning over his earnings to the care of his wife. She was a tailor and apparently worked much at her

trade. They jointly earned, jointly saved, jointly invested their earnings in the purchase and building of their home. The record discloses an unusual degree of mutual confidence and devotion in and to each other. She having the title to the property in her own name, with full knowledge of approaching death, it was most natural that she should desire that this fruit of their joint toil, this property so long their habitation, and which he had so largely produced, should be his very own.

There is no question of creditors' claims, and no other questions of possible wrong. There was no burden imposed on the grantee in this case, and therefore his acceptance must be presumed.

The general rule in that regard is stated in 8 R. C. L. 1000 to be:

"As a general rule, made statutory in some states, acceptance is *prima facie* presumed where a deed or instrument purporting to convey valuable property, and creating no obligation or burden to be assumed by the grantee, is delivered to the manual possession of the grantee himself, or to a third person for such grantee's benefit; and though there are cases to the contrary, some of the expressions in the opinions are too absolute, for it is not to be presumed that every one under all circumstances will accept whatever gift is offered him; still these expressions are to be read in the light of the case which the judge had under discussion, and it has been suggested that there are few, if any, authorities which refuse altogether to indulge the presumption where the deed is wholly beneficial and imposes no burdens upon the grantee."

And further by the same authority, as to the rule of relationship to date of deposit or delivery:

"There are two theories with reference to such a delivery and acceptance, which, though not always clearly differentiated by the courts, seem entirely distinct. One is that the actual acceptance by the grantee, even if not made until after the grantor's death, relates back to the time of the

delivery to the depositary. The other is that immediately upon the delivery to the depositary of a deed, wholly beneficial to the grantee, a presumption of acceptance arises, even if he does not know of the existence of the deed. On strict principle it seems that neither theory is entirely free from objection. It is not always possible to determine which the court had in mind, but, for the most part, courts disregard technical distinctions and consider a deed as taking effect subject to the rights of persons superior to those of the grantor, which intervened between the delivery of the deed to the depositary and its actual acceptance by the grantee, though a few cases accept the logical consequences of the theory of presumed acceptance, and hold that the deed is superior to all intervening rights." 8 R. C. L. 1017.

It was expressly held in *Criswell v. Criswell*, 138 Ia. 607, 116 N. W. 713, that:

"The question of delivery of a deed is chiefly one of intent to be gathered from the circumstances surrounding the transaction, as well as from direct proof; and where a deed is handed to a third person under circumstances indicating a desire and intention of the grantor that upon his death it shall be delivered to the grantee named therein, it constitutes a delivery, although there was no express direction so to do; and it is immaterial that neither such third person nor the grantee knew of the character or existence of the instrument until after its actual delivery to the grantee."

In sustaining these views may be cited *Matheson v. Matheson*, 139 Iowa 511, 117 N. W. 755, 18 L. R. A. (N. S.) 1167; *Riegel v. Riegel*, 243 Ill. 626, 90 N. E. 1108; *In re Bell's Estate*, 150 Iowa 725, 130 N. W. 798; *Clark v. Creswell*, 112 Md. 339, 76 Atl. 579, 21 Ann. Cas. 338; *In re Bralley's Estate*, 85 Vt. 351, 82 Atl. 5; *Buchanan v. Clark*, 164 N. C. 56, 80 S. E. 424; *Baker v. Hall*, 214 Ill. 364, 73 N. E. 351; *Miles v. Robertson*, 258 Mo. 717, 167 S. W. 1000.

In *Brinker v. Malloy*, 53 Colo. 186, 125 Pac. 507, it was said:

"The very essence of the delivery of a deed is the intention of the parties, which is to be gathered from their conduct and all the surrounding circumstances."

The rule is stated by Professor Brewster as follows:

"It has accordingly been held, in many cases, that when a grantor has parted with control of a deed, the delivery is complete and no acceptance by the grantee need be shown, nor even his knowledge of the deed, for its acceptance by him will be conclusively presumed until his express dissent is shown." Brewster on Conveyancing, p. 367.

Marvin v. Thompson, 23 Colo. 180, 46 Pac. 673; *Childers v. Baird*, 59 Colo. 382, 148 Pac. 854, and *Rittmaster v. Brisbane*, 19 Colo. 371, 35 Pac. 736, support the views herein expressed.

The judgment is reversed, with instruction to enter judgment in favor of the plaintiff in accord with the prayer of the complaint.

Hill, C. J., and Garrigues, J., concur.

Decided June 3, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9058.

ADY & CROWE MERCANTILE COMPANY v. HOWARD.

1. PLEADINGS—*Complaint*, Upon an account, showing upon its face full payment of all that defendant promised to pay exhibits no cause of action.
2. — *Amendment*. A party cannot by amendment relieve himself of admissions made in the original pleading.
- A complaint in an action upon an account of a third person which the defendant had promised to pay, gave the items of the account, and by credits set down, showed full payment of all for which defendant was liable. An amended complaint omitting all items of the account occurring subsequent to the date of defendant's promise was held a mere subterfuge, and a demurrer thereto properly sustained.
3. JUDICIAL NOTICE—*Taken*, of all the pleadings filed in the cause.
4. PAYMENTS—*Application of*. The general rule is that in the absence of a stipulation to the contrary, payments upon an account current are applied to the first items.

Error to Weld County Court, Hon. Herbert M. Baker, Judge.

Messrs. ZIMMERHACKEL & AVERY, and Mr. EDWARD G. KNOWLES, for plaintiff in error.

Mr. H. E. CHURCHILL and Mr. E. T. SNYDER, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THE plaintiffs in error, plaintiffs below, brought suit against the defendant, and in their first amended complaint alleged in substance an account against the Greeley Construction Company, for goods sold and delivered, specifically stated and itemized as follows:

October 24th, 1911, 1 car hay-----	\$155.00
October 24th, 1911, 1 car oats-----	700.40
March 8th, 1913, 1 car oats-----	530.00
March 8th, 1913, 1 car hay-----	242.32
March 8th, freight paid-----	35.94

Total value debits -----	\$1,663.66
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With the following cash credits:

November 29th, 1911 -----	\$250.00
December 30th, 1911 -----	150.00
May 1st, 1913 -----	808.76

Total credits -----	1,208.76
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Balance due on account-----	456.60
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It was further alleged that the defendant had in writing promised to be answerable for this debt of the construction company by the following letter:

"Greeley, Colo., 2-3-1913.

The Ady & Crowe Merc. Co.

Yours of February 1st at hand. Just at present all public works are at a standstill. As soon as the frost softens, so that I can put my teams to work, will give your

bill immediate attention. I have plenty to do for my outfit, and will take care of you.

Very respectfully, I remain yours,
(Signed) A. A. HOWARD."

Prayer was for judgment against the defendant for the alleged balance.

The defendant demurred to this complaint on the ground (a) that the promise alleged was not for the indebtedness sued on, and (b) that the writing set forth is insufficient to take the case out of the Statute of Frauds.

This demurrer was sustained by the court upon the ground that the letter specifically referred to a debt then existing as of February 1st, 1911, and can not be construed to have reference to subsequent debts. He found it unnecessary to pass upon the question of the sufficiency of the writing as a promise to be answerable for the debt of the construction company, under the statute.

It will be seen that the letter refers to an indebtedness existing as of date of February 1st, 1911. This according to the complaint was \$855.40. The complaint alleged a current account including this amount totaling \$1,628.22, upon which there had been paid the sum of \$1,208.76.

Clearly then the complaint on its face shows the full payment of the account, which it was alleged the defendant had in writing promised to pay, and therefore the demurrer was properly sustained. The correctness of this ruling is admitted by plaintiffs in error in their briefs.

But after the demurrer to the first amended complaint was sustained, the plaintiffs filed a second amended complaint differing from the first in the only material particular, that it omitted all debits and credits from the statement of account, occurring subsequent to the date of the letter, and thus attempting to show a debt existing at that time.

To this second amended complaint the court properly sustained a demurrer by defendant. The plaintiffs elected to stand on their second amended complaint and judgment rendered dismissing the cause of action.

This second amended complaint is a mere subterfuge. The court will take judicial notice of all the pleadings filed in a cause and the plaintiff is bound by the allegations of its first amended complaint, which stated its current account with the construction company in full, and the cause was therefore adjudicated by the court's action in sustaining the demurrer thereto. The general rule of law is that in the absence of stipulation to the contrary, credits upon a running account are to be applied to the first items of account. 30 Cyc. p. 1244; *Mackey v. Fullerton*, 7 Colo. 556, 4 Pac. 1198.

It is not necessary to consider the second ground of the demurrer.

The judgment is affirmed.

Hill, C. J., and Garrigues, J., concur.

Decided June 3, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9069.

THE PEOPLE v. POLLOCK.

1. **STATUTES—Construction—Implications.** Where a statutory provision is general everything necessary to make it effectual is supplied by implication.
The statute authorizing the sheriff to let an accused person to bail upon his entering into a recognizance with one or more sureties, by implication authorizes the sheriff to examine the proposed sureties, or take from them affidavits as to their properties.
2. **CRIMINAL LAW—Perjury.** One who offers himself as surety in a bail bond, makes, before a notary public, a false affidavit as to his financial condition. He is guilty of perjury.

Error to Denver District Court, Hon. William D. Wright, Judge.

Mr. FRED FARRAR, attorney general, and Mr. W. B. MORGAN, assistant attorney general, for the people.

Mr. WILLIAM A. BRYANS, for the defendant in error.

Opinion by Mr. Justice Allen:

JANUARY 11, 1916, an information was filed in the District Court of the City and County of Denver, charging or attempting to charge one James G. Pollock with the crime of perjury. On motion of the defendant, the court quashed the information. The People bring the case here for review. The only error assigned relates to the act of the trial court in sustaining the motion to quash.

So far as material to the questions presented to us by the record, the information alleges, in substance, that the defendant, on April 7, 1915, signed and executed an affidavit in the matter of an application for a bond in a case then pending in the District Court between the People and one John Wheeler; that the application was before the Commissioner of Safety and Acting Sheriff, who had full power and lawful authority to take and receive bonds and recognizances; that the defendant was sworn, and the oath was administered to him by a notary public; that the affidavit was one touching the defendant's property qualification to become a surety upon the bond of the said Wheeler, and that in the affidavit the defendant Pollock "did wilfully, corruptly and falsely swear" that he was the owner of certain described real estate situated within the City and County of Denver, "valued at \$5,000 and clear," and that he was "worth the sum specified" in Wheeler's bond. The information by appropriate averments showed the falsity of the defendant's sworn statements.

The grounds of the motion to quash are that "there is no law of the State of Colorado which authorized any notary public to administer any such oath" as was taken by the defendant; and that there is no "law in the State of Colorado requiring this defendant, in matters similar to those referred to in the information, to take any oath, or to subscribe the same before a notary public or any other person whatsoever."

The motion to quash presents but two questions. First, may a surety on a bail bond be guilty of perjury if he falsely and knowingly makes an affidavit as to his owner-

ship of property, or other qualifications as a surety, when justifying as such surety before a sheriff authorized to take the bail bond in question? Second, is a notary public authorized to administer the oath taken in such a case?

If the first question be answered in the affirmative, the second would also be thus answered, since by section 4671 R. S. 1908 (sec. 5258 Mills Ann. Sts. 1912) a notary public is authorized to administer an oath on any occasion where the affidavit is authorized or required by law to be taken. The only remaining question presented in this case is, does the law authorize or require a surety on a bail bond to make an affidavit touching his qualifications as such surety, in cases where such bail bond is lawfully taken by the sheriff.

There is no statute requiring the sureties on a bail bond, taken by the sheriff, to make affidavit that they are worth the amount for which they bind themselves. Section 1947 R. S. 1908 (sec. 2074 Mills Ann. Sts. 1912), which authorizes a sheriff to let persons to bail upon their entering into a recognizance with one or more sureties, does not expressly authorize the sheriff to examine proposed sureties or require or take from them an affidavit of the kind in question. Nevertheless, the statute by implication gives such authority. Where the provision of a statute is general, everything that is necessary to make it effectual is supplied by implication. 36 Cyc. 113, note 81.

When section 1947 R. S. 1908, above mentioned, speaks of "one or more sureties," it refers to and means responsible sureties. The statute would be ineffectual, and the bond would be worthless, if the sureties were irresponsible persons. In *United States v. Lee*, (D. C.) 170 Fed. 613, it is said:

"The purpose of a recognizance is not to enrich the treasury, but to serve the convenience of the party accused but not convicted, without interfering with or defeating the administration of justice. Sureties, therefore, should be persons of sufficient financial ability and of sufficient vigilance to secure the appearance and prevent the absconding of the accused."

In cases where a sheriff lets a person to bail and takes his recognizance or bail bond, the duty rests upon such sheriff to see that the sureties offered are responsible persons. In the discharge of this duty, the sheriff may accept or demand an affidavit from the proposed sureties, or persons offering themselves as sureties, touching their property or other qualifications.

The view above expressed is supported by the case of *State v. Wilson*, 87 Tenn. (3 Pickle) 693, 11 S. W. 792, where it is held that a statute imposing upon a justice of the peace the duty of taking "bond with good security," by implication carries with it the authority to "take sworn statements from the proposed surety and others touching his financial condition." To the same effect is *Territory of New Mexico v. Weller*, 2 N. M. 470. In *Commonwealth v. Butland*, 119 Mass. 317, it was held that a commissioner, to take bail in criminal cases, may require a written statement under oath from the bail. See also *Com. v. Miller*, 8 Pa. Superior Ct. 35, 41; 6 Corpus Juris 1011.

Upon the principles laid down in the authorities cited, the affidavit mentioned in the information in the instant case was one "authorized or required by law to be taken," within the meaning of section 4671 R. S. 1908, and under the same section the notary public named in the information had the authority to administer the oath which was taken by the defendant.

For the reasons above named, it was error to sustain the motion to quash. The case is reversed and remanded, with directions to the lower court to overrule the motion to quash and require defendant to plead to the merits of the action.

Reversed and remanded with directions.

Chief Justice Hill and Mr. Justice Bailey concur.

Decided June 3, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9288.

INDUSTRIAL COMMISSION ET AL. v. MARYLAND CASUALTY
COMPANY.

CONTRACT—*Construed.* Contract for the excavation of a tunnel, the mine owner reserving no more control of the work than necessary to enable him to secure due performance of the contract, creates the relation of independent contractor, and not that of master and servant.

Mere suggestions of the mine owner as to matters of detail, adopted and followed by the contractor, as a concession, and not as a matter of obligation, do not change the result. Nor does the occasional employment by the mine owner of miners working under his control, in order to hasten the work.

Error to Denver District Court, Hon. John. A. Perry, Judge. En banc.

Hon. LESLIE E. HUBBARD, attorney general; Mr. JOHN L. SCHWEIGART, assistant; Mr. STEPHEN W. RYAN, Mr. M. F. RYAN, for plaintiffs in error.

Messrs. SMITH, BROCK & FERGUSON, Mr. JOHN P. AKOLT, for defendant in error.

Opinion by Mr. Justice Teller.

THIS cause is before us to review a judgment of the District Court setting aside an award by the Industrial Commission in favor of said Reddy, and directing that the claim be dismissed.

It appears from the record that said Catherine Reddy was the aunt of John O'Mera, who was killed in a mine near Leadville, and that she makes claim, as a dependent upon the deceased, for compensation from one Weaver, the owner of the mine, and said Casualty Company.

O'Mera, at the time of the accident, was working in a tunnel being driven by Larson and O'Neil on the property of Weaver, under a contract in the words and figures following:

"This Agreement: Made and entered into this 10th day of December, A. D. 1915, between C. H. Weaver, party of

the first part, and Gus Larson and James O'Neil, parties of the second part, all of the County of Lake, State of Colorado.

Witnesseth: That whereas first party is desirous of securing the driving of the 'Anderson Tunnel' in Birdseye Gulch, and second parties are desirous of driving said tunnel,

Now, therefore, second parties agree to drive said tunnel 500 feet from the present breast of said tunnel, 5 feet wide by 7½ feet high in the clear, in such direction and on such grade as shall be directed by the engineer in charge, timbering where necessary. To drive a water ditch under the track 10 inches deep by 20 inches wide, and install all track, timbers, air pipe and ventilation pipe. To furnish all fuse, caps, powder and candles used in said work, and keep the boarding house supplied with wood and water. To do all work in a minerlike fashion and maintain all work driven under this contract until the completion of said contract. To maintain all tools and machinery in as good condition as when furnished, ordinary wear and tear excepted. To work continuously from this date with three shifts employed at all times underground.

In Consideration Whereof: First party agrees to furnish all tools, timbers and supplies except as above mentioned, furnish blacksmith, and keep the dump in condition for dumping dirt and rock at all times. To maintain a boarding house and board all the men engaged on said contract for \$1 a day per man. In case of the discharge of any man or men in the employ of the contractors, to pay same forthwith and deduct the amount from the next settlement with the contractors. To pay for said work \$11 per linear foot until such time as plant is installed for the operation of power, after which time the price shall be \$7.50 per foot, said payments to be made on or before the 5th day of each calendar month for all work completed before the end of the preceding calendar month. It is agreed that first party shall retain 20% of the contract price until

the completion of said contract as a guarantee for the completion of said contract.

C. H. WEAVER,
GUS LARSON,
JAMES O'NEIL."

On the hearing before the commission evidence was introduced to show that, despite the contract, Larson and O'Neil were not independent contractors, but mere employees of Weaver and his partners. This evidence consisted of statements as to conversations with Weaver, and acts of control exercised over the work by Anderson, one of the partners of Weaver, and one Campbell, who succeeded Anderson in the general superintendence of the mine; also by an engineer who came occasionally to the mine to see that the tunnel was run on proper lines. There was evidence also of an alleged usage which claimants contended changed the terms of the contract. From this the commission found that Larson and O'Neil were employees of Weaver, and that consequently O'Mera was also one of his employees.

The District Court held that the contract was plain and unambiguous, and hence evidence as to what was said of and about it was not admissible; and further that the evidence, if admissible, did not change the effect of the contract.

In this we think the court was right. The contract provides for the doing of a specific thing by the parties of the second part, for an expressed consideration, and gives to the party of the first part the right to withhold 20% of the compensation till the work is completed. It contains no reservation of any control of the work more than is necessary to insure its producing the result provided for.

In *Good v. Johnson*, 38 Colo. 440, 88 Pac. 439, 8 L. R. A. (N. S.) 1896, this court determined that one was an independent contractor, and not a servant, from the fact that the contract gave no right of control other than that which would secure the proper result from the work. Under the

rule adopted in that case, none of the things which Weaver or Anderson was said to have done was sufficient to sustain the contention of plaintiffs in error.

There is abundant authority for the above mentioned holding: *Casement v. Brown*, 148 U. S. 615, 37 L. Ed. 582, 13 Sup. Ct. 672; *Pottorff v. Mining Co.*, 86 Kans. 774, 122 Pac. 120; *Foster v. Chicago*, 197 Ill. 264, 64 N. E. 322, and *Labatt's Master and Servant*, 2nd Ed., Sec. 25.

In this case it is evident that when Larson or O'Neil followed the directions of Anderson or Campbell regarding the work, it was done as a concession and not as a matter of contract obligation. A distinction is to be made between authoritative control, and mere suggestion as to the detail of the work: *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721.

We agree, also, with the court that no custom or usage was proved which would affect the contract as written. Indeed, the matter upon which plaintiffs in error rely is, in fact, neither custom nor usage. The evidence showed only that, in order to hasten the work, miners were sometimes paid in accordance with the amount of work done, working under the control of the mine owner. This fact could have no bearing upon the contract in question, which is plain and unambiguous.

The court, in coming to its conclusion, did not vary the findings of the commission, but simply applied the law to the admitted facts. In *Good v. Johnson*, supra, this court said:

"The contract being in writing, the relation which it created between the parties thereto is exclusively within the province of the court to determine."

Finding no error in the record, the judgment is affirmed.
Judgment affirmed.

Chief Justice Hill and Mr. Justice Scott dissent.

Decided June 3, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9377.

EMPLOYERS' MUTUAL INSURANCE COMPANY ET AL. v. INDUSTRIAL COMMISSION ET AL.

1. **STATUTES—Construction.** The workmen's compensation act (Laws 1915, c. 179) is to be liberally construed for the protection of the employee.
2. **INDUSTRIAL COMMISSION—Authority.** Upon hearing the application of an injured workman for compensation, at a time so near the incurring of the injury that the extent thereof cannot be satisfactorily ascertained, the Commission may make an allowance, and give leave to the workman to apply at a later day for further compensation.

If upon further hearing new disabilities are manifest the Commission may make new findings, and an increased award.

It appearing upon a second hearing that the claimant had suffered an injury usually fatal, that his sight and hearing were impaired, that he was affected with vertigo and headaches, and entirely unable to follow his usual calling, and that this condition would probably be permanent, a finding that he had suffered a loss of twenty-five per cent of his earning capacity, and an increased award accordingly, was approved.

3. — **Procedure of the Commission—Evidence.** The Commission should first ascertain the extent of the disability, and whether permanent or not. If the disability is ascertained to be permanent they should ascertain the life expectancy of the claimant as an aid in fixing the aggregate due the claimant under the statute.
4. — **Allowance—Amount.** The only restriction made by the statute upon the allowance to claimant, is as to the weekly stipend which is not to exceed \$8.00.
5. — **Allowance not to be Enjoined.** Payment of the weekly allowance is not to be stayed by injunction, pending a controversy over its propriety, or the amount.

Error to Denver District Court, Hon. John A. Perry, Judge.

MR. L. WARD BANNISTER, Mr. LEROY MCWHINNEY, Mr. SAMUEL JANUARY, for plaintiffs in error.

Hon. LESLIE E. HUBBARD, attorney general; Mr. CHARLES ROACH and Mr. JOHN L. SCHWEIGERT, assistant attorneys general, and Mr. WALTER E. SCHWED, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

IN this case it is sought to have set aside a finding and award of the State Industrial Commission. In January, 1916, Thomas Pier, hereinafter called the claimant, was injured by the fall of a rock in a mine of The Leyden Coal Company, where he was employed. By agreement, approved by the commission, he was allowed \$8.00 per week from February 20th, 1916. In August, 1916, upon hearing the commission found that as a result of the injury he had lost twenty per cent of the hearing of both ears, forty-five per cent of the use of the left eye, and had suffered a permanent facial disfigurement. Taking as a basis the specific indemnity schedule of the Compensation Law, and the average wages of the claimant, together with the partial disabilities as above set out, the commission found that claimant should receive \$8.00 per week for approximately sixty-one weeks, or until April 20th, 1917, aggregating \$468.40; that deducting the amount already paid, claimant was entitled to \$340.82, including \$50.00 as indemnity for permanent facial disfigurement, and the order provided that he might apply for further compensation after April 20th, 1917, should his disability extend beyond that date. By specific order the commission retained jurisdiction of the case.

Presently before the 20th of April, 1917, claimant filed a petition for further compensation, and a hearing was had, following which, on June 6th, 1917, a finding was entered to the effect that the claimant was permanently partially disabled to the extent of twenty-five per cent; that his expectancy of life was 21.12 years; that had his disability been total the value of such expectancy, computed at \$8.00 per week, would be \$8,785.92, twenty-five per cent of which would be \$2,196.45; that the maximum indemnity allowed under the compensation law is \$2,080.00, and claimant was allowed further compensation at the rate of \$8.00 per week, or \$34.72 per calendar month, until he should receive \$2,080.00, less the amount already paid him. The order

further provided that the insurer might at any time apply to the commission for such relief as might be proper should changes occur in the physical condition of claimant.

The Leyden Coal Company and The Employers' Mutual Insurance Company applied for a rehearing, which was denied. They then filed their complaint in the District Court against the commission and the claimant. That court affirmed the findings and award and the companies bring the case here for review.

In substance the errors alleged are that the method of calculating the amount of compensation is wrong, the amount awarded excessive, and the payments thereof unlawfully augmented; that the finding of a disability of twenty-five per cent is erroneous, as including improper elements; that the findings do not support the award; and that there is no evidence to support findings of disabilities, other than those existing prior to the award of August, 1916, which it is insisted have already been finally and fully compensated.

The method used to calculate the amount of compensation appears to have not only been a proper one, but the only practicable one. It was plainly necessary to discover to what extent claimant was disabled, as that is the basis upon which he was to be compensated, and without which determination he could receive no compensation. The extent of the disability having been ascertained, and the condition determined to be permanent, it was permissible for the commission to ascertain and consider the life expectancy of claimant as an aid to fixing the aggregate amount due him under the statute. Inasmuch as the statute provides a maximum amount which a claimant may receive for permanent partial disability, his life expectancy is at least a proper element for consideration to assist in determining whether he is entitled to the full maximum allowance or a less sum.

The insurance company vigorously assails the order compelling payment of \$8.00 per week on the ground that

claimant is entitled to only approximately \$2.50 per week. Under the compensation act the only restriction is as to the weekly allowance, which is limited to not more than \$8.00 per week. Section 57 of the act provides that, after six months from the date of injury, payments may be ordered made "in such manner as it" (the commission) "may determine to be for the best interest of the parties concerned." The act is to be construed liberally for the protection of the employee, in reference to payments for disability. *In re Meley*, 219 Mass. 136, 106 N. E. 559.

The basis of the objection on the part of the insurance company to the payment of the sum found to be due under the compensation award, in payments of \$8.00 per week, rather than the smaller sum, is that this increase in weekly payments operates to the detriment of the company, for the reason that the longer the time given it to complete the payment, the more likelihood there will be that claimant will die, and so relieve the insurer of further liability. While this may be, and probably is, true, as matter of fact, it is neither a legal nor logical reason for denying the right of the commission to use its discretion in the matter of the size of the weekly installments, after the lapse of the first six months immediately following the injury.

The finding that claimant was disabled to the extent of twenty-five per cent of normal effectiveness is not erroneous, either because it includes improper elements, or elements for which adjustment has already been made. When the award of August, 1916, was made the full extent of claimant's disabilities were not ascertained, nor could they be then ascertained and compensated with justice either to the claimant or the insurer. As was said in *Lamieux's case*, 223 Mass. 346, 111 N. E. 782:

"It is common knowledge that the result of physical injuries are very often not determinable at the time they are received. In the common course of events, a requirement that such results shall be stated is to demand the performance of an impossible thing."

The finding and award of August, 1916, was not final in the sense that, regardless of the future physical condition of claimant, neither he nor the insurer should be permitted to show such physical change. For this reason the commission not only had the right, but it was its legal duty, to retain jurisdiction of the case for further action and award if the facts should so warrant. The finding and award made at the first hearing are abundantly supported by the evidence, and can not now be properly disturbed.

The decree of June 7th, 1917, was based upon the evidence taken at a previous hearing, at which it was shown that the original disability of the claimant had grown worse, and that new disabilities were manifesting themselves. Thereupon the commission made new findings and a new award, which manifestly are supported by competent evidence, and which may not, therefore, be lawfully overturned by this court. As neither the first nor the second findings of fact were in excess of the powers of the commission, nor procured by fraud, and as both are supported by sufficient competent evidence, there is no ground for attack upon either.

Claimant was found to have suffered a fracture of the base of the skull, usually a fatal injury, as a result of which his sight and hearing were impaired, and he suffered from dizziness, headache and general disability; he was unable to work at his occupation of mining coal, by which he was accustomed to earn \$18.00 per week; he was unable to do any hard work for long at a time; and that his condition would probably be permanent. Upon these facts he was adjudged to have suffered a loss of twenty-five per cent of his earning capacity, and payment was ordered accordingly, with the right to have payment reduced at any time upon proof of an improvement in his physical condition. So far as the insurer is concerned, the findings and award could not well have been made more equitable, and were and are clearly within the letter and spirit of the compensation act.

In reaching a conclusion the commission appears to have

proceeded in an expeditious and summary manner, as is the rule in compensation cases, with no more formality, technicality or restrictions than are necessary to preserve the rights of both parties, and administer justice. *In re Hunnewell*, 220 Mass. 351, 111 N. E. (Mass.) 934.

The insurance company applied in the District Court for an injunction against the enforcement of the award of the commission until the court had passed upon the questions involved. That application was denied below and renewed here, where it was again denied.

It is to be noted in this connection that the judgment of the commission in favor of a claimant is *prima facie* evidence of his right to recover. Procedure under the act is summary in character in order to furnish immediate aid to injured employees, and a careful reading of the statute as a whole leads to the conclusion that it was the intention of the Legislature that payment of these weekly allowances should not be stayed. Indeed, to hold that such payments can be enjoined pending judicial review would in effect practically nullify one of the prime objects and purposes of the law.

A painstaking consideration of the whole record discloses no reversible error and the judgment of the District Court is affirmed.

Judgment affirmed.

Decision *en banc*.

Mr. Justice White and Mr. Justice Teller not participating.

Decided June 3, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 8963.

WESTERN COLORADO POWER COMPANY v. GIBSON LUMBER
AND COAL COMPANY.

1. TRIAL—*Questions for Court*. The construction of a contract, if unambiguous, is for the court; to submit it to the jury is error.
2. — *Instructions*. Where the plaintiff is entitled to recover only

upon the theory that a contract in writing was modified by a subsequent agreement in parol, the jury should be specifically so instructed.

Error to Mesa District Court, Hon. Thomas J. Black, Judge.

Mr. C. J. MOYNIHAN, Mr. R. H. WALKER, for plaintiff in error.

Messrs. WATSON & SMITH and Mr. BENJAMIN GRIFFITH, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was brought for the recovery of money alleged to be due for lumber furnished by plaintiff to defendant. The transaction was based upon a written contract incorporated in the pleadings, and also upon certain oral modifications thereof, the terms of such modifications being in dispute. Verdict and judgment were for plaintiff for \$4,603.68 and costs. Defendant assigns error and brings the cause here for review.

The fourth and fifth assignments of error reach the questions of the propriety of an instruction given by the court, and of one tendered by the defendant and refused.

By the written contract the plaintiff agreed to furnish the lumber in question at the rate of \$21.00 per thousand feet, board measure. The first and second items of the bill, which is expressly made a part of the contract, are for certain pieces 2x8x16, part of which are double-grooved and part single-grooved, "with splines," and each item is carried out in board measure. It appears that splines are narrow strips to fit the grooves cut into the larger pieces with which they are incorporated in the bill. From the itemized inventory it is clear that the splines were included therein and were to be furnished as a part of the bill of lumber. According to the written agreement, they were to be of the same quality of material as the balance of the lumber, white, or Engleman spruce. It is admitted that the specifications as to the kind of material was later orally modified as to the splines, and it was then agreed that they were to be of

Oregon fir. It is contended that defendant by oral agreement undertook to pay extra for the splines at one cent per lineal foot. The defendant denies that it was to pay for the splines as an independent item, and contends that they were to be furnished as part and parcel of the 2x8x16 pieces designated in the written contract.

The question of an agreement to pay for the splines as a separate and independent item was for the jury to settle under the evidence upon proper instructions. This item aggregates \$1,819.00, with interest, and the determination of whether there was an independent and separate contract therefor becomes a matter of controlling import. The attention of the jury was called to this question by an instruction of the court in the following language:

"You are instructed that the original contract provided that the plaintiff furnish the defendant with white or Engleman spruce splines. If you find from the evidence that the contract as originally entered into was changed with the consent of both parties so that clear Oregon fir splines, surfaced on four sides, of dimensions of $\frac{1}{2}$ by 1, should be furnished, and that at the time of such change the defendant expressly agreed to pay for such splines so furnished at the rate of one cent per lineal foot, then in estimating the amount of plaintiff's recovery you will give it credit for all splines furnished under the contract at that rate; should you find that there was no express agreement on the part of the defendant to pay one cent per lineal foot for the splines, then you should in estimating the amount of plaintiff's recovery give it credit only for the reasonable market value of the splines delivered, provided that should you find from the evidence that at the time of entering into the contract there was an understanding between plaintiff and defendant that no charge for splines should be made, then the plaintiff would not be entitled to recover anything on account of splines delivered unless after the original contract was entered into a modification was made requiring the delivery of Oregon fir splines, and that at the time of

such change the defendant agreed to pay for splines furnished at the rate of one cent per lineal foot."

Defendant objected and excepted to the giving of the foregoing instruction and requested the following instruction, which was refused, and to which refusal objection was made and exception saved, to-wit:

"You are instructed that the written contract of July 10, 1913, included and governed the furnishing of splines by plaintiff to defendant, and that under said written contract the defendant was to receive said splines free of charge; that afterwards it was agreed that the splines to be furnished by plaintiff were to be of clear Oregon fir, instead of white or Engleman spruce. You are further instructed that you will find for the defendant upon this item of splines unless you find, from a preponderance of the evidence, that there was an express agreement between the plaintiff and defendant that the Oregon fir splines should be paid for by defendant at the rate of one cent per lineal foot."

From the written contract it is plain that the splines were included in and covered by the bill of lumber of which they were clearly made an integral part. In other words, they were to be furnished without additional cost, as part of the grooved pieces, board measure. The inventory of the lumber specifically and definitely shows this and the jury should have been so instructed. The rule is well settled that where a contract is clear and unambiguous, its construction is for the court. *Good v. Johnson*, 38 Colo. 440, 88 Pac. 439, 8 L. R. A. (N. S.) 896; *Aaron v. Mo. & Kans. Telephone Co.*, 84 Kansas 117, 114 Pac. 211; *Brady v. Cassidy*, 104 N. Y. 155, 10 N. E. 131.

The sole question in this connection is whether the written contract, which provides for splines without additional charge, was supplemented by oral agreement providing for independent and separate pay therefor. This question, and this question alone, on this phase of the case, should have been submitted to the jury. Under the instruction given the court left it to the jury to determine whether, under

the written contract, splines were free or were to be charged for as a separate item. This was clearly error. On this point the defendant requested a correct instruction, and it was highly prejudicial not to give it. From the record it is impossible to say on what theory the jury returned its verdict, whether upon its construction of the written contract holding that it calls for pay for splines, as a separate and independent item, or upon a finding that there was an oral supplemental agreement providing that an extra charge was to be made therefor. It is only on the theory that there was such supplemental agreement that plaintiff could recover in this action for splines at all, and the jury should have been definitely and specifically so instructed. Failure to thus instruct the jury was fatal error.

Objections were made and error assigned upon other alleged errors, particularly as to the counter-claim. So far as this hearing is concerned, these assignments are not of controlling or vital importance, and we do not now deem a discussion of them necessary. Undoubtedly if errors were committed, as alleged and assigned in these particulars, a matter not now decided, upon a new trial, with more deliberate and painstaking consideration, such errors, if any there were, are not likely to occur again.

The judgment is reversed and the cause remanded for a new trial in harmony with the views herein expressed.

Judgment reversed and cause remanded.

Mr. Chief Justice Hill and Mr. Justice Garrigues concur.

Decided July 1, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 8976.

DRAKE v. SLESSOR.

1. NEGLIGENCE—*Pleading*. Negligence may be alleged in general terms. Under such general allegation evidence of specific matter is admissible.

If the defendant fails to move that the general allegation be made specific he will not be heard to complain of its generality. Ac-

tion for injuries occasioned by the fall of plaintiff from a hay-stack, alleged to have been caused by the negligence of defendant "in the control, management, and operation of the hay-stacker." Evidence that one of the horses used in operating the stacker was not well broken held admissible.

2. APPEAL AND ERROR—*Harmless Error*. Action for negligence in operation of haystacker. Evidence was received that one of defendant's horses was young and not well broken. But the injury occurred by the breaking of a cable to the haystacker, and nothing done by the team could have had any effect in producing this fracture. The admission of the evidence was therefore held without prejudice to the defendant.

So as to the admission of testimony as to the stakes by which the stacker was fastened to the ground.

3. — *Instructions*. Where the jury are fully and fairly instructed, one or more paragraphs in the charge which cannot have misled the jury are harmless.

Error to Larimer District Court, Hon. Robert G. Strong, Judge.

Department.

Mr. THOMAS J. LEFTWICH, Mr. L. R. TEMPLE, for plaintiff in error.

Mr. L. D. THOMASON, Messrs. ANNIS & KILLGORE, for defendant in error.

Opinion by Mr. Justice Teller.

PLAINTIFF in error seeks to reverse a judgment against him obtained by the defendant in error in an action for personal injuries.

The parties will be designated as they were in the trial court.

The complaint alleges that the plaintiff was employed by the defendant in stacking hay; that, about noon on the day of the injury, defendant caused a part of a hay-stacker to be brought against the side of the stack upon which plaintiff was working at a height of more than 20 feet from the ground, for the purpose of enabling him and the other men

on the stack to descend; and that, while plaintiff was on the stacker for the purpose aforesaid, the wire cable by which the stacker was raised and lowered broke, precipitating plaintiff to the ground whereby he was seriously and permanently injured.

Negligence is charged as follows:

"10. That the accident and injuries received by plaintiff, as aforesaid, were the result of, and caused by, the carelessness and negligence of defendant in the negligent control, management and operation of the said hay-stacker; that the said wire cable, at the place where it broke, as aforesaid, was at that time, and for some time previous, had been in an unsafe and defective condition—many of the outer strands of wire having been broken or worn through—thereby rendering said wire cable in a weak and dangerous condition.

11. That the weak, defective, unsafe and dangerous condition of said wire cable was well known and understood by said defendant at the time of the accident and injuries received as aforesaid."

Defendant's motion to strike the first four lines of the paragraph quoted was denied, whereupon defendant filed an answer denying negligence, etc., which calls for no consideration.

The errors assigned are the overruling of the motion to strike, the overruling of objections to evidence, the giving of several instructions, the refusal to give sundry requested instructions, and the want of evidence to support the verdict.

There was no error in denying the motion to strike. It is elementary that negligence may be plead in general terms, and if a defendant fails to move that the general allegations be made specific, he has no ground of complaint in this court because of their generality. Under such general allegations evidence is admissible of specific matters: *Denver Electric Co. v. Lawrence*, 31 Colo. 308, 73 Pac. 39.

It is urged that the court erred in admitting evidence that one of the horses used in operating the stacker was young and not well broken; but, if that fact had a bearing on the negligence charged in operating the stacker, it was clearly admissible. If, however, the contrary be true, the admission was clearly not prejudicial, since there was no testimony that the team, at the time of the accident, did more than to back up a step or two, which it was required to do in lowering the stacker. There appears to be no possible connection between this movement of the team and the breaking of the cable. Neither was the admission of testimony as to the stakes by which the stacker was fastened to the ground error. It does not appear to be material to the issue, but it could have no effect on the jury.

While the evidence as to the cause of the cable's breaking is meager, it was, we think, sufficient to justify the submission of the case to the jury. Defendant testified that he stopped work because he saw a roughness in the cable, a half dozen of the wires having parted and sprung out from the cable; that he then called the men to go to dinner, and put the stacker up against the stack so the men on it could come down; that the cable may have rubbed against the stacker; and that it appeared to have done so.

Two witnesses besides the plaintiff testified that defendant said that the accident was due to his fault; and that the cable was defective. One witness testified that defendant said the cable had worn on the arm of the stacker. Plaintiff testified that defendant said to him that "the cable was on the bum all the forenoon, but I didn't want to stop to fix it; didn't want to delay the work."

The jury was at liberty to accept this testimony as true, and it is sufficient to sustain the charge that the cable was defective to the knowledge of defendant.

We find no error in instruction number 2, which is attacked merely as "abstract and academic." As the other instructions apply the law to the facts in evidence, this one could not have misled or confused the jury.

The objection to instruction number 7½ is that, under a complaint charging a specific act of negligence as to a specific defect, the jury was left free to find negligence if they concluded that the cable broke because of any defect in it. This ignores the fact, already pointed out, that the case was triable under the general charge of negligence. There was, then, no error in that instruction.

It is said that instruction number 8 is bad, failure to warn not being charged, because it states that, if defendant knew or should have known of a dangerous defect in the cable, and failed to warn the plaintiff of the danger, such failure was negligence on the part of the defendant.

Defendant testified that he did not say anything to the men when he stopped for dinner after seeing the defect in the cable.

It is true that there is no direct charge of negligence in failing to warn the plaintiff, and strictly speaking there was no reason for giving the instruction. Still, we can not say that it would be at all likely to affect the jury. The question before them was clearly whether or not the defendant was negligent in the matter of the cable; and it can not well be supposed that the mention of the duty to warn of known dangers induced the jury to determine the cause on a matter only incidentally mentioned. We do not think this instruction was prejudicial to the defendant.

Objection is made to instruction number 10 because of a supposed conflict between the statement that negligence is not presumed, and one that it may be inferred from facts established by the evidence.

The objection is without merit.

Instructions numbers 12 and 13 are attacked as not justified by the evidence; but they were clearly proper.

The instructions as a whole presented the case fairly and fully to the jury, and there was no error in refusing to give other instructions.

The judgment is affirmed.

Chief Justice Hill and Mr. Justice White concur.

Decided July 1, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 8994.

LEWIS ET AL. v. COOPER INVESTMENT COMPANY.

1. **ESTOPPEL**—*By Contract.* The Cooper Company leased to the Shubert Company premises upon which the latter proposed to erect a theater. The lease provided that the lessor, to secure the payments stipulated to be made by the lessee, should have a lien paramount to all others upon the interest of the lessee. The Shubert Company issued a series of bonds secured upon the property by assignment of the lease to a trustee, and agreed with the bond holders that the leasehold and building should not be incumbered except upon the written consent of the owners of two-thirds of the bonds outstanding. After bonds to a very large amount had been sold, the lessor, lessee, and trustee, entered into a supplemental agreement to the effect that "the bonds issued by the lessee upon any building upon said premises shall be first lien upon said lease and buildings." Later, the building being still incomplete, the Shubert Company without funds, and largely indebted, and it being impossible to find a further market for the bonds, the trustee, and more than the required proportion of the bond holders consented to the execution by the Shubert Company of a mortgage to secure \$120,000, to relieve it of its indebtedness. The mortgage being executed, and this sum being advanced by plaintiff the Shubert Company resumed building, but later defaulted in the ground rent, and in interest upon the loan, whereupon the Cooper Company brought its bill to foreclose the mortgage. Certain bond holders then filed a petition in intervention claiming a lien by virtue of their bonds, prior and superior to the mortgage, contending in argument that the Shubert Company at the date of the execution of the mortgage had no right, title or interest in the premises, nor any valid power to execute a mortgage thereon, and that the mortgage was void. *Held* that the mortgage having been executed with the consent of every one having an interest in the premises, was as effectual and binding upon every bond holder as if he or she had personally subscribed the consent to its execution.

Error to Denver District Court, Hon. John A. Perry, Judge.

Mr. JOHN H. GABRIEL, Mr. EDWIN H. PARK, Mr. THOS. H. GIBSON, for plaintiffs in error.

Messrs. GILLETT & CLARK, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS is an action to foreclose a mortgage. The defendant in error, on the 2nd day of June, 1910, executed and delivered to The Shubert Building Corporation a lease for a period of ninety-nine years upon certain lots at the corner of California Street and Eighteenth Street, in the City of Denver. It was stipulated in this lease, in addition to the payment of ground rent, that the lessee should pay the taxes of every kind upon said premises; that to better secure the payment of these obligations the lessor should have a first lien paramount to all others, upon all right, title and interest of lessee in and to said premises as security for the agreed payments; that within four months from the date of the lease, the lessee should commence the erection of a theater and office building, to cover the entire area of the property, of the kind and character provided in the lease, and at a cost of not less than \$500,000, and should not charge the property with liens.

Afterward and on the 10th day of June, 1910, the lessor, lessee and The German American Trust Company entered into a trust agreement, the purpose of which is stated in the preamble as follows:

"Whereas, the lessee has obtained from the lessor a lease for a period of ninety-nine years covering lots eleven, twelve, thirteen, fourteen, fifteen and sixteen, block one hundred fifty-nine, East Denver, in the City and County of Denver, State of Colorado, said lease being recorded in the office of the Clerk and Recorder of said city and county in book 2137, at page 1, and

Whereas, the lessee is about to erect on said lots a ten-story office, and a three-story theater building, and intends to raise a fund to cover the cost of such improvements by the issue of not to exceed seven hundred thousand dollars

worth of its six per cent ownership gold bonds (profit-sharing), hereinafter called 'bonds,' a copy of the form of which is hereto attached and marked 'Exhibit A,' and hereby made a part hereof, and the said lessee intends to complete at the present time only six stories of the said office building and to issue to said trustee for such purpose about the sum of four hundred thousand dollars worth of said bonds, and when the said lessee shall complete the said building by constructing the remaining four stories thereof and issue to the trustee for such purpose such part of the remaining three hundred thousand dollars worth of bonds as may be necessary to complete the said ten-story building, and to certify to the trustee as each part of the said building is constructed the actual cost thereof, and the said trustee is to certify and deliver only such an amount of said bonds as shall be necessary to cover the cost as certified to the said trustee, of the said theater and six-story portion of the said building and of the said additional four-story portion of said building, and the trustee shall receive and disburse the proceeds of said bonds, and hold by assignment said lease in trust and to carry in its name insurance upon said premises in trust, all as specified in said lease, in said bonds and hereinafter, and

Whereas, the lessee purposes selling its bonds either for cash upon written subscriptions, a copy of the form of which is hereto attached, marked 'Exhibit B', and hereby made a part hereof, or on installments under written contracts, a copy of the form of which is hereto attached, marked 'Exhibit C,' and hereby made a part hereof."

Insofar as important here, the lessee specifically agreed:

"That said lease, together with all the right, title and interest of the lessee therein, stands hereby assigned to the trustee upon trust, and for the uses and purposes herein-after specified. * * *

That upon the delivery of said subscription or said contracts for bonds to the trustee, as hereinabove provided, said subscriptions and contracts shall stand assigned to the

trustee with full authority to said trustee to collect all sums due thereunder. But the duty and expense of enforcing the payment of delinquent subscriptions shall rest upon and be borne by the lessee, if not by the subscriber.

That in case the lessee shall fail to comply with the terms of said lease within thirty days after receipt from the lessor of notice of default, the lessee shall forthwith and without further notice surrender to the trustee the management of said building and the collection and disbursement of all rents and profits until such time as the lessor advises the trustee that the lessee is under the lease no longer in default."

The trustee in this agreement bound itself, among other things, as follows:

"First: That the trustee hereby accepts the assignment of said lease in trust for the benefit of the bondholders, the bond subscribers, the lessee and the lessor, as their respective interests appear from said lease and this instrument, and from said exhibits hereto attached.

Second: That whenever the lessee shall exhibit to and leave with the trustee the written consent of the holders of two-thirds in amount of the outstanding bonds to a mortgage or a sale of the rights or any part of the rights secured by said lease, and shall also nominate in writing the mortgagee or the vendee, the trustee shall upon payment to it by such mortgagee or vendee of the consideration agreed upon, assign to such mortgagee or vendee all rights directed to be covered by said mortgage or sale, the acts of the lessee in exhibiting by written consent and in nominating in writing said mortgagee or vendee, shall be conclusive of the trustee's right to make the assignment as aforesaid, and shall be full authority and protection to the trustee in making any such assignment.

In the event of a mortgage, the proceeds shall be disbursed by the trustee in the manner provided for the disbursement of the investment fund. In the event of a sale of the rights or any part of the rights secured by said

lease, the trustee shall distribute the proceeds coming into its hands from such sale as follows, to-wit:

(a) Such portion of said proceeds as will not exceed in amount the investment fund defined in said bonds to the bondholders pro rata.

(b) The balance of such proceeds, if any, in excess of said investment fund less the trustee's reasonable fee, to the lessee for distribution according to the terms of said bonds.

(c) That the trustee hereby accepts the assignments provided for in said lease and agrees to perform the duties imposed upon the trustee by the terms, both of said lease and in this instrument, and of each of said exhibits attached hereto, subject to the conditions herein contained.

(d) That the trustee shall, upon the full or final payment for any of said bonds in accordance with the subscription or contract therefor, date such bond as a full or final payment, sign the certificate thereon and deliver said bond to the subscriber, taking his receipt therefor.

(e) That the trustee shall hold in trust all sums paid to it hereunder by subscribers for said bonds or received as proceeds of any mortgage of the lessee's property, and shall make payments therefrom only for: (1) the compensation of the trustee, as herein provided; (2) commissions for obtaining bond subscriptions at the rate of twelve and one-half per cent on the amount of bonds subscribed for, for the construction of said building, the same to be paid as cash payments are made on such subscriptions; (3) ground rent and other payments required under said lease; (4) the cost of the construction of the building, and the purchase of equipment therefor, which lessee has under said lease agreed to construct and furnish, including the building permit and the street and alley protection fees, and any other payments required to comply with the ordinances of the City and County of Denver, and (5) interest on bonds and on payments made on contracts for bonds during the construction of said building. All the above

payments by the trustee shall be made only upon orders of the lessee approved by the lessor, or its duly authorized agent, and in case of labor and material upon the certificate of the architect, which shall be attached thereto, and the trustee shall keep on file the original written authorizations or orders for all payments made, which shall be full protection and authority to the trustee in the premises. If any premiums shall be paid to the trustee on bonds sold or subscribed for, such premium shall be forthwith paid over to the lessee for credit to the surplus fund. Any interest upon any unused portion of the investment fund shall be paid over to the lessee to be credited to the profit."

Further:

"Seventh: That the trustee shall hold and disburse, according to the terms of said lease, any moneys received under fire insurance policies on said building, * * *.

Eighth: That the trustee shall certify and deliver only such an amount of bonds as shall cover the cost of the theater and six-story portion of said building, and the additional four-story portion of said building and for betterments, and the certificate of the lessee as to such cost shall be final and conclusive as to all parties to this agreement.

Ninth: That the trustee shall make reports to the lessor and to the lessee on or before the 10th day of each calendar month showing all receipts, disbursements and bonds, together with the dates thereof delivered hereunder during the previous calendar month until completion of said building. Subsequently thereto, reports shall be made by the trustee when called for either by the lessor or the lessee, and all monies and securities held by the trustee for the lessee or the bondholders, shall be subject to the inspection and examination of the lessee, or of any agent of the lessee appointed in writing by the Board of Directors of said lessee for that purpose. * * *

Eleventh: That in case the lessee shall fail to comply with the term of said lease within thirty days after receipt

from the lessor or notice of default, the trustee shall assume the management of said building and the collection of all rents and profits and shall make disbursement therefrom as provided by said lease and the exhibits hereto attached and shall perform such service until the lessee shall, under the lease, no longer be in default, or the lease be forfeited under the terms and provisions thereof. For these services, the trustee shall receive reasonable compensation. When the lessee shall be no longer in default the trustee shall forthwith surrender to the lessee the entire management of said building and shall pay over to said lessee all moneys arising from such rents and profits then being in the hands of said trustee, less said reasonable compensation. If said default continue until said lease is forfeited under the terms and provisions of said lease, the trustee shall forthwith surrender to the lessor its possession of said building, if possession it has."

It was further provided:

"That this agreement is not intended to abrogate, modify, or in any manner change any of the provisions of the said lease, except as said lease is modified or changed by the lessor's consent to the following stipulations of this agreement:

(a) The lessor consents to the assignment of said lease to the trustee as herein made, in trust, however, for the purpose hereinbefore set forth and that said trustee shall not thereby assume any individual liability as assignee of such lease, but shall be liable to the lessor only for any indebtedness or liability of the lessee to the lessor under the terms and provisions of said lease, and to the extent only of any funds it may receive from the said building while said trustee may be in possession of the same under the terms and provisions of this trust agreement. * * *

(e) The lessor consents to the distribution of insurance moneys as provided in said lease.

That if it shall be found that there is any conflict between any provisions or stipulations of said lease and any

provisions or stipulations hereof, except those last above specified, then the provisions and stipulations of said lease shall prevail and remain in full force and effect, notwithstanding anything herein contained. If any dispute shall arise between said lessor and said lessee as to the existence of any conflict between the provisions of said lease and the provisions of this instrument affecting any duty upon the part of the trustee, then said lessor and said lessee shall at once give notice to said trustee of such dispute and of the purport thereof."

Attached to this agreement and made a part thereof was a copy of the proposed form of bonds in which the bond was designated as "Ownership Gold Bond, Profit Sharing," in which it was provided that it was one of an issue limited to \$700,000 and enough only to be issued to cover the cost of the construction of the building; that a sum of money equal to the face value of all outstanding bonds shall constitute the Investment Fund, and to be expended in the building and equipment of the structure, the payment of commissions for placing the bonds, and trustees' fees; that the investment fund was to be disbursed by the trustee upon orders from the lessee; that the lease was to be assigned to the trustee, with the following provisions as to mortgage of the lease hold property:

"The company hereby agrees with the bondholders that the leasehold and building assigned to the Trustee as security for the Bonds or any property acquired in lieu thereof, shall not be mortgaged or sold except after notice mailed to all bondholders, and then only with the written consent of all the owners of two-thirds in amount of all outstanding bonds and the Company. In the event of mortgage, the proceeds shall be disbursed in the manner provided for the disbursement of the investment fund. In the event of sale, the proceeds therefrom shall be divided as follows: The trustee shall pay to the outstanding Bondholders the face value of the Bonds so held; the remainder, together with the surplus and sinking funds, shall be di-

vided equally between the bondholders and the company, thus terminating the enterprise.

In determining profits, there shall be deducted from the gross income only disbursements incident to the acquisition, ownership, management and protection of the property in which the Investment and Surplus Funds are invested, together with the Sinking Fund, and the Trustee's fees after the completion of said building. The company will bear its officers' salaries and office expenses."

Then follow provisions for the distribution of profits, excess profits, dividends, and surplus funds, as between the Shubert Company and bondholders together with a provision as to the kind of securities in which investment should be made of the surplus funds, but in no place is the obligation under this bond treated as a debt, with promise to pay any definite sum, except upon conditions, with specified rate of interest, or at any fixed time.

At a later date and after there had been sold bonds of the face value of \$413,600, and of the net value of \$375,000, and apparently to induce a further sale of bonds, the same parties entered into a supplemental trust agreement, the effect of which was to eliminate that provision in the original trust agreement declaring, "That the lessor shall have and is hereby given a first lien, paramount to all others, upon all the right, title and interest of the lessee in or to the above described premises," and to substitute therefor a provision, "that the bonds issued and to be issued by the lessee upon any building upon said premises shall be and remain a first and prior lien upon said lease and buildings to secure the payment of the same, with interest thereon.

Under these conditions the Shubert company proceeded with the erection of the building, and prosecuted the same until some time in the year 1912, when finding itself without funds, all building operations ceased. No more bonds could be sold, and the building was uncompleted. Added to this the Shubert company was indebted to various parties, including the Central Savings bank in the total sum of

\$125,000 which had been expended in the construction of the building, and an additional sum for unpaid taxes. In this situation the Shubert company proceeded to negotiate a loan to pay these debts and to complete the building, in order to provide against forfeiture of the lease, and to protect the investment of the bondholders, who seem to be the only persons who had put any money into the enterprise.

The company applied to the Central Saving Bank & Trust Company for a loan of \$160,000 for this purpose, to be secured by a mortgage upon the leasehold premises. This the said bank declined to do but proposed that it would loan the said sum to the Cooper Investment Company, and that such company might reloan the amount to the Shubert company. This was finally agreed to by all the parties. The Shubert company then proceeded to address a circular letter to each of its bondholders stating in detail the conditions with which it was confronted, and with a request for their written consent for the issuance of the mortgage.

This consent was secured from more than the required two-thirds in interest, of the bondholders, and notes and mortgage executed by the Shubert Company to the Cooper Investment Company, to secure the payment of the said sum of \$160,000. The Cooper company in turn borrowed this sum from the Central Savings Bank and Trust Company, and the money was deposited with the German American Trust Company, and paid out under the terms of the trust agreement.

It may be noted that the Central Savings Bank & Trust Company before making the loan, required the payment to it of the sum of \$14,500 due it from the Shubert company, out of this sum, which was done by check of the Shubert company on the German American Trust Company in conformity with the terms of the trust agreement.

The Shubert company then resumed its building operations and completed at least the theater part of the building, but found itself in further financial difficulties. It owed for labor and materials to the extent of \$34,616.97,

and was in arrears for ground rent to the extent of three monthly payments, and had defaulted in its payment interest on the \$160,000 loan. The Cooper company then instituted this foreclosure proceeding. The plaintiffs in error filed their petition in intervention claiming a lien by virtue of their bond holdings, prior and superior to the Cooper company mortgage.

The court rendered judgment in favor of the Cooper Investment Company in the sum of \$205,075.35, the amount due on the notes secured by the mortgage, which was ordered to be foreclosed and the proceeds applied, first to the satisfaction of existing liens for labor and materials, and afterward to the payment of the amount found to be due on the mortgage.

While some other questions were raised and determined by the trial court and we think correctly so, there is but one question really urged and stated by counsel for plaintiffs in error as follows:

"Therefore, upon ultimate analysis the fundamental and final question to be determined is that of the validity of the mortgage. This, of course, is dependent upon the right of The Shubert Building Corporation to execute such a mortgage, and of necessity that right is dependent upon (1) a valid existing title in The Shubert Building Corporation at the time of the execution of the mortgage; or (2) if no such title existed, upon some valid power legally conferred upon The Shubert Building Corporation by those in whom the right to confer such power existed, and its valid execution.

If the Shubert Building Corporation had neither such title nor such power upon which to base the right to execute such mortgage, or if such power existed and was never exercised, we take it that it follows as a necessary conclusion that the mortgage was void and that no cause of action ever existed thereon in favor of The Cooper Investment Company."

The argument in support of this contention in brief, as stated by counsel, is:

"The point, therefore is, that The Shubert Building Corporation had no title or estate, either legal or equitable in the property described in the pretended mortgage. They were assigned to the trustee for the purposes stated in the trust agreement, and those purposes were not to secure anything owing to The Shubert Building Corporation, for no one was obligated in any manner to it, but to secure the so-called bonds in the manner specified, by raising the funds for the payment of their principal and six per cent per annum either through the sinking fund to be set aside during the term of the lease, or the sale of the properties and the termination of the enterprise. The only right, therefore, of The Shubert Building Corporation under the trust agreement was a simple contract right to receive a part of the surplus profits from the building in the event they should be made, and its remedy for the enforcement of that right was not in rem against the premises (for it neither had nor reserved any lien for that purpose), but against the trustee in equity for the proper discharge of its duties under the trust agreement."

There were just four parties that had any sort of interest in the leased premises and in the leasehold, and together they had all the interest in the property of whatsoever kind or character. These were The Cooper Investment Company, lessor, The Shubert Building Corporation, lessee, The German American Trust Company, trustee, and the so-called Profit Sharing Bondholders. These all agreed to and participated in the securing of the loan for the purposes intended, and the execution and delivery of the mortgage in question.

There is no suggestion of deception or fraud, nor that such action was not necessary or even vital to the enterprise, indeed, the bondholders had made the whole of the investment, and a forfeiture of the lease which was clearly imminent, would necessarily wipe out their investment in its entirety.

Under the circumstances of the case every bondholder was as fairly bound as if he had personally signed his written consent. The mortgage provision was provided in the lease, and included in the original and supplemental trust agreements, and was therefore binding upon the lessor, the lessee and trustee.

It was inserted in the so-called bonds and therefore became a specific obligation contained in the bondholders' contract, so that when all interests, expressly agreed to the execution of the mortgage which covered all their joint interests whatever they were, they and neither of them will be permitted to question the validity of the contract, which they directed to be made, on the ground that one of the parties may have but a conditional interest, or no interest at all.

Even if we were to concede that the bondholders had a superior lien on the leasehold premises, prior to the execution of the mortgage, they expressly waived that right by their voluntary consent to its execution and delivery, in the manner and form theretofore provided in their agreement with all the parties concerned. This voluntary agreement to the execution of the mortgage lien, by all parties in interest, necessarily superseded in that respect, all prior agreements, if any, in conflict therewith. The legal conclusion of the trial court based upon the facts presented, admits of no question. It was said:

"Here is what was accomplished, viz.: On the date of the execution of the indenture of lease, The Shubert Building Corporation became the holder of the legal title to the leasehold interest thereby created. It continued to be such legal holder until it executed and delivered the assignment of the leasehold interest to the German American Trust Company, and joined with that Company and the Cooper Investment Company in the execution of the trust agreement. Thereupon the Shubert Building Corporation ceased to be, and the German American Trust Company became the holder of the legal title, in trust for the Shubert Building Corporation, the bond holders, the Cooper Investment Company and itself.

The trust agreement not only authorized but it required the German American Trust Company to reassign the legal title to a mortgagee when requested so to do by the Shubert Building Corporation and two-thirds in amount of the bondholders, when it received the consideration for such mortgage. The mortgage was made by the Shubert Building Corporation to The Cooper Investment Company, the Shubert Building Corporation, and two-thirds of the amount of the bondholders requested the assignment of the leasehold interest to the Cooper Investment Company, and such assignment was made. The effect of the transaction was to mortgage the beneficial interest of the Shubert Building Corporation and the bondholders, whether it transferred to the Cooper Investment Company the legal title, or not."

This proposition of law neither requires argument nor the citation of authorities. Besides, the claim and contentions of plaintiffs in error find no support in equity or good conscience. It is patent that by reason of the sums of money secured by reason of the mortgage, the leasing company were enabled to complete at least the theater part of the building, and under the receivership in this case, and at comparatively small additional cost, the six-story part of the building has been entirely completed, and the forfeiture of the lease thus apparently avoided; this to the first and paramount benefit of the plaintiffs in error, and those similarly situated.

The judgment is affirmed.

Hill, C. J. and Garrigues, J., concur.

Decided July 1, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9012.

BURRELL v. MASTERS.

1. PLEADING—*Departure*. Action upon Contract. The complaint set up the legal effect of so much of the contract as the plaintiff relied upon. The answer set up other provisions of the contract, alleging noncompliance therewith by plaintiff. The reply

assuming to respond to the new matters so asserted in the answer was not a departure.

2. CONTRACT—*Non-Performance*. One cannot complain of the non-performance or defective performance of a contract occasioned by his own act or default.

Error to Otero District Court, Hon. J. E. Rizer, Judge.

Mr. JOHN H. VOORHEES, for plaintiff in error.

Messrs. SABIN, HASKINS & SABIN, Mr. CLYDE T. DAVIS, for defendant in error.

Opinion by Mr. Justice Allen.

THE defendant in error, plaintiff below, brought this action against the plaintiff in error, defendant below, to recover the sum of \$748.10 alleged to be due under the contract which is hereinafter mentioned.

In his complaint, the plaintiff alleged, in substance, that he had entered into a contract in writing with the defendant, by the terms of which he agreed to grow five acres of long white spine cucumbers, and to thresh and deliver the seed obtained from said cucumbers to the defendant; that by said contract the defendant agreed to accept the seed, and to pay therefor the sum of 20 cents per pound; that in compliance with the contract the plaintiff did grow five acres of cucumbers from seed furnished him for that purpose by the defendant, and delivered to the defendant the seed obtained as the result of such growing.

The defendant filed a motion requesting that the plaintiff be required to set out *in haec verba* the contract in writing sued on. This motion was denied. The defendant thereafter filed an answer, admitting the execution of the contract mentioned in plaintiff's complaint, but setting forth other and further terms of the contract by a reference to a copy of the contract which was attached to the answer. The contract provided, among other things, that the defendant "may refuse to accept the crop" if in his judgment the crop is in any respect "unfit for seedmen's use, and

cannot be made fit without an unreasonable amount of cleaning or hand picking." The answer denied that plaintiff complied with the terms of the contract in the planting, growing, harvesting and delivery of the seed, and further alleged "that the seed so grown was of a mixed variety, not fit for seedmen's use."

The plaintiff filed a replication in which he admitted that the seed grown and delivered by him was of mixed varieties, but alleged, in substance, that the seed which had been furnished to him by the defendant "was mixed" and "that the action of the defendant in delivering him impure stock seed rendered that portion of said contract requiring the plaintiff to grow five acres of long white spine cucumber seed impossible of performance."

The defendant moved to strike the above mentioned allegations of the replication on the ground "that the same is a departure from the cause of action as set forth in the complaint." The motion was denied, and the case came to trial before a jury upon the issues made by the pleadings. The issues were found in favor of the plaintiff, and judgment was rendered in accordance with the verdict. The defendant brings error.

The first question discussed in the brief of plaintiff in error relates to the trial court's ruling upon defendant's motion to strike portions of the replication. It is contended that the plaintiff's reply, in respect to the allegations thereon which have been hereinbefore noticed, was a departure from the allegations of the complaint and hence not permissible under the rule that a plaintiff cannot change the cause of action in his replication.

The plaintiff in his complaint set forth so much of the contract as was essential to his cause of action, stating the part of the contract relied on according to its legal effect. No demurrer was interposed to the complaint. The defendant in his answer set forth certain additional terms of the contract and alleged a nonperformance of such terms by the plaintiff. This was new matter, set up by way of an

affirmative defense. The replication subsequently filed by the plaintiff, in respect to the allegations complained of in the defendant's motion, merely alleged matters which constitute an answer to the new matter which was set up in the answer. This was permissible. 1 3C. J. 747. The allegations of the replication were not inconsistent with those of the complaint.

The facts and the pleadings in the instant case, so far as the question of departure is concerned, are analogous to those appearing in the case of *Erickson v. F. McClellan & Co.*, 46 Wash. 661, 91 Pac. 249. We adopt as a part of this opinion, the following language from the case cited:

"A departure in pleading takes place when, in a subsequent pleading, a party deserts the ground taken in his last antecedent pleading and resorts to another. Here there was no desertion of the cause of action set out in the complaint. The respondent (plaintiff below) was still compelled, in order to recover, to prove the principal allegations of his complaint, and the most that can be said against the pleading is that the entire cause of action is not set out in the complaint. But to set out a part of the cause of action in the complaint and the balance in the reply is not a departure in pleading."

For the reasons above indicated there was no error in overruling the motion to strike, nor in the trial court's rulings on evidence where the defendant made objections based on the theory that there was a departure in the replication.

The plaintiff in error further contends "that as a matter of law, plaintiff was not entitled to recover." To support this contention, counsel quotes that portion of the contract which provides that the defendant "may refuse to accept the crop" if in his judgment the same is in any respect "unfit for seedmen's use," and also quotes from the contract the following clause:

"No payment is to be made for any seed which you (meaning the defendant) do not consider sufficiently pure, clean, and dry for seedmen's use."

After discussing the validity and effect of such provisions, counsel next states that "the evidence in this case shows" that the defendant notified the plaintiff "that the seed were unfit for seedmen's use and that he would not accept the same."

From the foregoing situation plaintiff in error draws the conclusions that he, defendant below, had the right to refuse to accept any pay for the seed delivered. The conclusion, however, is not warranted by the pleadings and the evidence in this case. The contract provided that the plaintiff was to grow the seed from "Stock Seed to be furnished" by the defendant. The plaintiff's replication while admitting that plaintiff failed to deliver pure and unmixed seed also alleged, in effect, that plaintiff's non-compliance with the contract as to the character of the seed to be furnished by him was due to the act of the defendant in furnishing impure and mixed stock seed for planting. The plaintiff introduced evidence to support such allegation, the jury found such evidence sufficient, and we cannot say that the same was insufficient to support the verdict. This being true, and the other issues also being found in favor of the plaintiff, it follows that the plaintiff was entitled to recover. If the plaintiff failed to deliver pure and unmixed seed, to the satisfaction of the defendant, such failure was due to the act of the defendant in the latter's failure to furnish to plaintiff pure and unmixed stock seed for planting. The defendant is not now in a position to escape liability on account of plaintiff's non-compliance with the contract as to the character of the seed to be delivered. 13 *Corpus Juris* 647. The rule is aptly and concisely stated in *Empson Packing Co. v. Clawson*, 43 Colo, 188, 198, 95 Pac. 307, as follows:

"He who prevents a thing from being done may not avail himself of the nonperformance which he has, himself, occasioned; or, if the performance of any obligation is prevented by one of the parties to a contract, the party thus

prevented from discharging his part of such obligation is to be treated as though he had performed it."

We find no error in the record, and the judgment is therefore affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

Decided July 1, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9062.

LEBSACK v. MOORE.

1. NEGLIGENCE—*Driver of Auto Car.* The defendant driving an auto car upon a road with which he is acquainted, and ascending from the south a hill, the other activity of which is hidden from view, and knowing that travelers may be expected to be ascending the hill from the north, passes another auto car at great speed, shortly after commencing the descent, and failing to see one ascending from the north upon a motor cycle, collides with him, doing serious injury. Held a clear case of negligence.
2. CONTRIBUTORY NEGLIGENCE—*Sudden Peril.* A party confronted by sudden peril from the negligence of another is not to be charged with contributory negligence for every error of judgment where instantaneous action is required.

Error to Larimer District Court, Hon. Neil F. Graham, Judge.

Mr. P. D. NELSON, Messrs. LEE & SHAW, for plaintiff in error.

Mr. JOHN H. SIMPSON, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THE plaintiff below, defendant in error, recovered judgment against plaintiff in error, in the sum of \$3,250.00 as damages for injuries sustained by reason of the alleged negligence of defendant, and in a collision between plaintiff's motorcycle and defendant's automobile.

The collision occurred at a point on the Lincoln highway about three miles south of the city of Loveland, which road

at that point runs north and south. The plaintiff, a young man about twenty years of age, was proceeding south on his motorcycle, and defendant from the opposite direction with his automobile. The plaintiff had turned into this highway from a road leading from the east, and at a point approximately 600 feet from where the accident occurred. Between the point where plaintiff turned into the highway and the location of defendant at the time, was the apex of a hill which was apparently of sufficient elevation to prevent either from seeing the other. Both were proceeding up hill, and toward each other.

The plaintiff had passed over the apex of the hill and to a point about 25 feet beyond, when the collision occurred.

The defendant assigns as error the refusal of the court to direct a verdict in his favor because of the alleged insufficiency of the evidence, and error in giving certain instructions; also the refusal to give other instructions tendered.

The plaintiff Moore, testified that after he turned around the corner, and started up toward the top of the hill, he rode on the right hand side of the traveled part of the road. That this brought him at about the middle of the highway. He further says:

"When I turned the corner, I saw no one in the road, no one ahead of me, and was not aware of any one's presence in the road until I got to the top of the hill. The first I noticed was two cars facing me, one right on each side of the road, about six or eight feet apart, I should judge. There was no signal given. As I came to the top of the hill I was riding between eighteen and twenty miles an hour. The automobiles, when I first saw them, could not have been over one hundred fifty feet away. When I saw them the only chance I thought I had was to go between them, there was enough room to go between them, and I threw my weight on the left hand side of the motorcycle and speeded up and tried to go between them and that is

the last I knew. After the accident I was sitting up in the middle of the road. It was Lebsack's car that was in front of me. I don't know how far I traveled after turning to the left; the machine was struck right back of the foot board on the motorcycle; that is back where the pedals are. I could not tell whether the car coming toward me came straight or turned. The cars were right on me on each side of the road; it was on me so quick I could not do anything. I do not know what occurred after being struck except I was sitting up in the road and some fellow was asking me if I was hurt pretty bad, and I tried to stand up and the bone was just chattering; that is the last thing I can remember about it. The next I knew anything about the matter I was in the hospital at Loveland, it must have been two or three days afterward."

It appears that immediately preceding the accident the defendant had driven around, and to the left of, another car occupied by two persons, M. G. Nelson, cashier of the First National Bank at Ft. Collins, and Mr. Eves, the president of that institution. Mr. Nelson testified in substance:

"At the time the Lebsack car went around we were going twenty-five miles an hour. Mr. Eves and I were discussing driving on highways, and the different rates of speed, and we happened to be watching the speedometer, and I said to Eves, 'We are driving just 25 miles an hour now.' This was just at the instant the other car appeared. I don't know how long it took, he was going faster than we were; he went right by us. I don't know how long it took, he was going faster than we were, and we were driving twenty-five miles an hour when he came up; he went around us, I don't know how many lengths of our car we traveled while Mr. Lebsack was going around. * * *

I noticed this motorcycle about the same time I saw the car; it was practically on us when I saw it. It seemed like when I saw this man Lebsack I saw the motorcycle boy too, and about that time the accident happened. There was no appreciable time between my seeing them and the hap-

pening of the accident. It seemed to be all right at one time. We were going north on the road, and Lebsack came around our car, and as he got around and I looked up I saw the motorcycle about the same time, but the boy came right between us and he hit Lebsack's front wheel first, and that threw the motorcycle and the boy over toward us, and the boy back into Lebsack's car and ripped the fender and running board off Mr. Eves' car, as I remember it."

Mr. Eves testified:

I was present at the accident on August 17, 1915, and was driving my automobile, was driving approximately 25 miles an hour. Right as Mr. Lebsack was going around us Mr. Nelson and I were talking about speeds, and we were keeping the speedometer on the good roads right about 25 miles an hour. We were discussing this just as I noticed Lebsack getting up around us going by. Lebsack went around us quite speedily; passed within a very short distance. His rate of speed would be all guess work. I think he passed in a car length, but I might have been estimating it too rapidly. * * * I think Lebsack gave no warning signal at any time just prior to accident. I didn't see the boy, and didn't see his machine until he was coming over the front wheel of Lebsack's car, and right over the wheel. I heard the impact, heard the noise and saw the bulk coming over, one piece one way and one another. That is the first I saw or heard of it. * * * I remember of having said to Lebsack, 'Well, if I had known you were in such a hurry I would have stopped and let you go by,' or something like that. He said he didn't know what he had struck, and that he came back as soon as he could stop. He didn't know what had happened, he said. It is a pretty hard question to answer how far to the left of our car Lebsack's was at the time he was going by, it seemed to me he gave us good room. I think it was as much as anywhere from six to eight feet. He gave us plenty of room, swung clear around. I think it was fully that far, possibly more."

It will be seen from this that the defendant had just driven around the Eves car, and at a rate of approximately fifty miles an hour. He drove around on the left side of the Eves car, which would put him on the side of the road, or the traveled part of it, which would naturally be taken by the plaintiff. He gave no warning of his approach, and it is patent that when the plaintiff first saw the cars, they were about abreast, and as stated by plaintiff and corroborated by Eves, there was from six to eight feet between them.

Eves testified further that the defendant's car was in front of him when the collision occurred. The defendant testified that he did not see the plaintiff until after the collision, but heard a sound at the time as if a stone had struck the fender.

This testimony furnishes sufficient evidence of negligence to go to the jury and we think that upon the whole evidence the jury was amply justified in finding for the plaintiff.

The defendant was fully acquainted with the road, had full knowledge of the hill which he was ascending, and that travelers might reasonably be expected to be approaching from the other side, and that they would be expected to pass the Eves car on the same side of the road upon which he was traveling in passing the car in front of him. His conduct appears to be a palpable want of the exercise of ordinary care.

As to the alleged contributory negligence of defendant it appears that the plaintiff saw both cars approaching him, with the defendant's car at the right, and not more than one hundred and fifty feet from him, and he was then compelled to either attempt to pass between them as he did, or attempt to pass to the right of defendant's rapidly moving car, which seemed to him at the instant more hazardous.

It was a question of the instant exercise of judgment. He was forced to this dilemma by what appears to be the speed mania of defendant, in which all duty and prudence

were clearly cast aside. Upon this point the court correctly instructed the jury as follows:

"A party suddenly realizing that he is in danger from the negligence of another is not to be charged with contributory negligence for every error of judgment when practically instantaneous action is required; so in this case, if you believe from the evidence that the emergency was not created by or contributed to by plaintiff's own negligence, and that the plaintiff just before he was struck by the defendant's automobile, might have acted differently and escaped the injury, if you also believe that the plaintiff was using ordinary care in seeking to avoid a collision, and while so doing he was struck by defendant's automobile, then it is your duty to find for the plaintiff in such amount as may be justified by the evidence."

The evidence fully justified this instruction, and it correctly states the law upon that subject. *Colorado Midland Ry. Co. v. Robbins*, 30 Colo. 449, 71 Pac. 371.

We have carefully considered suggested errors in the instructions of the court, and find no prejudicial error. Indeed, they are very complete and as favorable to the defendant as the law justifies in such a case. No good purpose can be served by a discussion of the criticisms offered.

The judgment is affirmed.

Hill, C. J., and Garrigues, J., concur.

No. 9086.

LARIMER AND WELD IRRIGATION COMPANY v. WALKER.

1. IRRIGATION—*Overflowing Stream*. Under the statute (Rev. Stat. sec. 3202) a natural stream may be used for conveying appropriated water, but one so using the stream must make sure that the flow does not rise above the danger point.

—Where several irrigating companies operate their properties together, and substantially as one, each is liable for injuries occasioned by an overflow in a stream, due to one of those so associated.

2. IRRIGATION—*Joint Torts*. An injury occasioned by the joint acts of several irrigating companies in attempting to convey an excessive amount of water in a natural stream, charges each and all of such wrong doers.

Error to Larimer District Court, Hon. Neil F. Graham, Judge.

Mr. L. R. RHOADES, Messrs. LEFTWICH & TEMPLE, for plaintiffs in error.

Messrs. STOW, STOVER & SEAMAN, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was brought by Henry Walker, defendant in error, for damages to his property occasioned by the alleged negligent use of Dry Creek in the transmission of irrigating waters by The Larimer & Weld Irrigation Company and The Water Supply & Storage Company, plaintiffs in error. The suit originally included The Douglas Irrigation Company and The Larimer and Weld Reservoir Company as defendants. An amended complaint was filed, which The Douglas Irrigation Company moved to have stricken as a departure. The motion was sustained, none of the other defendants joining in it. Plaintiff elected to stand upon his amended complaint, and The Douglas Irrigation Company was accordingly dismissed as a defendant. At the close of the testimony of the plaintiff The Larimer & Weld Reservoir Company moved a dismissal as to it, which was sustained. There was a verdict and judgment for plaintiff against the two remaining defendants and damages awarded in the sum of \$920.00. They assign error and bring the case here for review.

The essential facts are that plaintiff owns a farm on Dry Creek. About the 12th of September, 1913, The Water Supply & Storage Company was using the creek as a channel to convey water from two reservoirs for the use of the stockholders of another reservoir. On the same day there was turned into the creek by The Douglas Irrigation Company, 211 feet of water for the use of its stockholders along

the Larimer & Weld Canal. It appears that the joining of these two volumes of water raised the stream in the channel above its capacity, resulting in an overflow, causing the damage of which complaint is made.

It is contended that the 211 feet of water from the Douglas reservoir belonged to that company, and that The Larimer & Weld company was a carrier merely. That The Water Supply & Storage Company had no knowledge whatever that the creek was being used to convey any other water than that which it had turned into the stream. And it is further objected that the record does not establish a joint tort.

Under the statute a natural stream may be used to convey appropriated water for use further down the channel. It is incumbent, however, upon those so using natural channels to make sure that the water conveyed does not raise the flow of the stream above the danger point. This is not disputed by defendants; but it is insisted that the 211 feet turned into the stream did not belong to the Larimer & Weld company, and that such company could exercise no dominion over it until it had entered their ditch. It is also contended that the 65 feet which was being carried in the creek at the same time was water for the use of the stockholders of The Windsor Reservoir Company, and not under the control of either of the defendants while it was in Dry Creek.

The record shows that for some years prior to the commencement of this action, there had been a custom to carry and exchange water between the reservoirs and ditches of the several companies involved, for the benefit of their several stockholders, and that both the 211 feet and the 65 feet were turned into the creek on the 12th of September in accordance with such agreement. It also appears that those instrumental in conveying these waters through the creek were fully advised as to the exchange agreement, and that the 211 feet of water was turned in upon the request and under the direction of The Larimer & Weld Irrigation Com-

pany. There is ample testimony to the effect that all interested parties were fully aware that both the 211 feet and the 65 feet had been turned into the creek on the day in question. These and other matters of fact were for the jury to determine, which it did, under correct instructions as to the law. There is absolutely nothing to warrant a reversal of the conclusion of the jury upon the facts. The testimony shows that the defendant companies were operating together and that the acts of the one were in effect the acts of the other. Indeed, it appears from the evidence that the companies were largely operated in common. No one of them should be allowed to hide behind the skirts of the other. To permit this would be to approve a mere subterfuge, and the courts should not lend aid to such conduct.

A further contention is that the evidence fails to establish a joint tort. In order to render parties jointly liable for tort it must clearly appear that the wrong complained of flowed from their joint action or non-action. *Mead v. Zang Brewing Co.*, 43 Colo. 1, 95 Pac. 284. To make them jointly liable the injury must be the result of concerted action. *Stratton's Independence v. Sterritt*, 51 Colo. 26, 117 Pac. 351. In 36 Cyc. 483, the principle is thus stated:

"Where different persons owe the same duty and their acts naturally tend to the same breach of their duty, the wrong may be regarded as joint and both may be held liable."

In this case the injury complained of was plainly the result of the joint acts of the defendants in attempting to convey an excessive amount of water through Dry Creek. The commingling of their respective allowances of water in the stream produced the injury, and under the rule announced they are each liable for the damage done, and are therefore jointly liable. The case was tried upon a correct theory and the instructions given properly stated the law governing the issues involved.

Other assignments of error are without merit, and the judgment of the trial court is affirmed.

Judgment affirmed.

Decided July 1, A. D. 1918. Rehearing denied December 2, A. D. 1918.

No. 9197.

UZZELL, ET AL. v. MCCLELLAND, ET AL.

1. DEED—*Consideration.* The Reverend Thomas A. Uzzell was for twenty-eight years the pastor of the People's Tabernacle Church in Denver. For the most of this time he received a salary varying from \$50.00 to \$150.00 per month—for the greater part of the time much less than \$150.00. During a portion of the time, holding a public office, he received no salary. The money for the payment of his salary, for the other expenses of the society, and for the purchase of certain real estate were obtained by his efforts from those not associated with the church, but who contributed through confidence in the pastor, and an appreciation of his work. Beginning with nothing, the organization, through his efforts, were possessed of a church building worth \$50,000, three other lots adjacent thereto, not used for religious purposes, \$1700 in the treasury, and owed no debts of consequence.

During his last illness, at a meeting of the society duly called, it was voted by a large majority to convey to the pastor the three lots adjacent to those on which the church was situated. The president of the board having conveyed to him but two of the lots so designated, after the death of Uzzell, at a meeting duly called, the society voted, again by a large majority, to convey all the three lots adjacent to the church, to his heirs.

The conveyance was supported, as upon sufficient consideration.

2. RELIGIOUS SOCIETY—*Call of Meetings.* Sec. 865 of the Revised Statutes has no application to religious organizations. Their own rules and regulations control in the call of their meetings.

Error to the Denver District Court, Hon. H. P. Burke, Judge.

Mr. HENRY E. MAY, for plaintiffs in error.

Mr. T. H. HOOD, Messrs. MURRAY & INGERSOLL, for defendants in error.

Chief Justice Hill delivered the opinion of the court:

THIS action was brought by the defendants in error as members of the People's Tabernacle Congregational Church of Denver, upon behalf of themselves and other members who might see fit to join, against the plaintiffs in error, to have cancelled and held for naught a certain deed from the church organization to Thomas A. Uzzell, its former pastor, others to his heirs, and subsequent conveyances for Lots 4, 5 and 6 in Block 79 East Denver, for an accounting of rents, profits, etc. Trial was to the court which found that there was no consideration for these deeds, and ordered them cancelled, etc.

The record discloses that The People's Tabernacle Congregational Church of Denver was incorporated February 9, 1884, as a religious organization; that the Rev. Charles Uzzell was its first pastor and for about eighteen months, when he was succeeded by his brother, the Rev. Thomas A. Uzzell, who continued with it as such for about twenty-eight years, and up to the time of his death in 1910; that in March, 1900, the church acquired title to Lots 1 and 2 in Block 79, East Denver, being a corner on Twentieth and Lawrence Street; that in July, 1900, it acquired the title to Lots 3, 4, 5 and 6 in Block 79, being the adjoining lots to the corner; that the funds for the purchase of other lots theretofore owned by the church, as well as these, and for the erection of the church edifice upon the three corner lots were secured, a small part from the members, the balance and principal amount by donations from public spirited citizens through the efforts of the pastor, the Rev. Thomas A. Uzzell, who in this manner financed the organization. While there is testimony tending to show that many of those who made large contributions gave at his solicitation, upon account of their appreciation of his work, and confidence in him, regardless of the denominational character of his church, and without any strings upon his use of it, there is other testimony which establishes that during this period he was known and understood to be a congregational min-

ister, and this church a congregational church. The record discloses that when purchased, the lots in controversy adjacent to the three upon the corner on which the church building was constructed, had some small residences thereon which were later changed or rebuilt, and turned into store buildings; that they were rented and the revenues used for church purposes, the same as other church funds. The testimony further shows that during this long period of Parson Uzzell's pastorship, he received as a salary various amounts ranging from fifty to one hundred and fifty dollars per month, but for the greater portion of the period much less than the larger amount; that the moneys for the payment of this salary, as well as for the other expenses, were raised principally by his efforts, to a large extent from outside sources; that the amounts varied, depending upon the ability and willingness of the people to give. The testimony shows that for several years of this period, while continuing his labors as pastor, he held a county office, during which period he received no salary from the church.

In the Fall of 1910, the pastor was taken to a hospital in which he passed away. While at the hospital the chairman of the board of trustees, at their direction, called upon him to ascertain what they could do for him financially, it being generally known that he was possessed of but a small amount of this world's goods. His wife had preceded him to the land beyond; at this time he had three grown children, as well as a minor daughter, Helen, about fourteen years of age. The result of this and other interviews between the trustees and the pastor resulted in his sending a communication to the congregation as follows:

St. Luke's Hospital,

12:35 P. M., Dec. 5, 1910.

To the board of trustees and the members of The People's Tabernacle Congregational Church of Denver, it comes to me that you are to have a meeting on Wednesday night, Dec. 7, looking after my temporal support in the future.

At first it looked as if I might be called over to the other side very soon, leaving little or nothing for Helen's education. It was then that I thought a legacy might be allowed to her by the church, to help her in her education.

Later I improved, then it looked as though I would recover and live for some time. Then it occurred to me that if a legacy was made at all it should be made to me. For if after recovery I should not be strong enough to work, I would have something to fall back on in old age and decrepitude.

It seems you do not know my position well. With the three lots numbers 5-6-7 deeded to me I would have no fear for Helen or myself.

I have recently been talking with some of the business men who gave me this money for this property, and they tell me it was never their intention to give to the organization. They knew no organization they said, they were giving this money to Parson Uzzell, to build a house in which to preach to the poor. And they expected me to use it for that purpose, and afterwards keep enough to sustain myself, and the balance to go into some benevolent institution in the city. We won out solely on this in the old church, as you all know.

Now if it is your real object to make my last days pleasant and happy then turn over to me the three lots to properly sustain me when I am unable to work.

Every member of the board has solemnly promised to carry out my desire in this particular. I now make my desire known unto you, and this is all I can do.

Yours truly,

Thomas A. Uzzell."

The record shows, as stated in this letter, that a meeting of the members of the church had been called for the purpose of making some financial provisions for the parson. At this meeting a resolution was offered providing for the payment of \$60.00 a month to his minor daughter, Helen,

for twelve years and making it a lien upon the church building, etc. An amendment was made that in lieu thereof the church deed the adjacent Lots 4, 5 and 6 in Block 79, East Denver to Parson Thomas A. Uzzell, as requested in his letter. This amendment was carried by a vote of twenty-eight for, to sixteen against. The record further discloses that the president of the board did not carry out the wishes of the church as expressed at that meeting, but on or about December 15th, 1910, caused to be executed and delivered a deed for two of the lots as called for in the resolution; that Parson Uzzell passed away on December the 17, 1910; that soon thereafter his heirs took possession of these two lots and have retained them ever since. Nothing further appears to have been done until the 28th of January, 1914, at which time at a meeting of the members of the congregation by a vote of sixty-four to forty-one, a resolution was adopted reading in part as follows:

"Whereas, on or about the 7th day of December, A. D. 1910, at a special meeting of the members of this church, regularly called, it was by a large majority voted that this church deed to Parson T. A. Uzzell lots number four (4), five (5) and six (6), in block number seventy-nine (79), East Denver; and

Whereas, the then president of the Board of Trustees wrongfully and in violation of his trust refused to execute a deed to said three lots, but did execute a deed to lots five (5) and six (6), in block number seventy-nine, East Denver; and

Whereas, the services rendered to this church by the said Parson T. A. Uzzell were of great value and he at no time received anything like adequate compensation therefor, and it was for this reason that said three lots were ordered to be deeded to him; and

Whereas, in all fairness, justice and equity all of said three lots should have been deeded to said Parson T. A. Uzzell, the same to be his sole property, and this church has no claim, right, title or interest to said three lots, or any of them."

This is followed with a ratification of their former acts and instructions to the board of trustees to execute a deed for all three lots to the heirs of Parson Uzzell, pursuant to which deeds were issued accordingly. The heirs then took possession of the other lot. Thereafter, and on December the 14th, 1915, this suit was brought by certain of the members, and also in the name of the church organization to cancel these conveyances, upon the ground that those to the parson and his heirs were without consideration; also for the alleged reasons that the notices of the meetings, etc., at which their execution was authorized were not sufficient; that their execution was a breach of trust, etc. The court found that the deeds were given without consideration, and for that reason ordered them set aside.

The plaintiffs in error contend that the defendants in error have no right, authority or capacity to maintain this action. We will not pass upon this question, but prefer to go to the meat of the contention. There is no material conflict in the testimony and in our opinion the court erred in not holding that there was a sufficient consideration for these deeds. The record discloses that Parson Uzzell had been with this society for about twenty-eight years; that he was the center of its church life and activity for over a quarter of a century; that he participated mildly in its prosperity, and shared alike with it and the congregation in their adversities; that he built it up from practically nothing at the beginning of his stewardship, to a good-sized, healthy congregation, both spiritually and financially, and that at the time of his death he left it with a church building on three lots, worth fifty thousand dollars, clear of incumbrance, with no debts of any consequence, and money in its treasury to the amount of about \$1,700.00; that the six lots cost about \$13,000.00; that the church edifice erected on the three corner lots cost about \$42,000.00; that of this only about \$1,000.00 was contributed by the congregation, the balance in large amounts from public spirited citizens who, appreciating the parson's noble work and hav-

ing confidence in him, contributed liberally to the cause in which he was engaged. We simply state these matters in order to call attention to the fact that the question of consideration in a case of this kind cannot be determined by the ordinary rules applicable to private stock corporations operating for the benefit of their stockholders. The record shows that the trustees of the church, and that portion of its membership then taking any special interest in the matter were of the opinion that the organization was indebted to the parson more than it could ever repay him, and that mindful of the great work he had done for them and realizing that he had never been compensated in anything like the amount which his services were worth, that they wanted to do something for him in the same unselfish and generous spirit which had always marked his association with them; that they first discussed the payment to his daughter, Helen, of \$60.00 per month for twelve years with a mortgage on the church property to secure it. It appears that this was not satisfactory to the parson, and that the ultimate result of these conferences and their meetings was the execution and the delivery of the deeds intended in so far as the lots would go in payment for the services theretofore rendered in his labor for the church and the cause, without which it would have no excuse for existence. In our opinion all of these facts disclose a sufficient consideration for the deeds.

Neal & Son v. Stanley, 17 Ga. App. 502, 87 S. E. 718; *Viley v. Pettit*, 96 Ky. 576, 29 S. W. 428; *Spencer v. Potter's Estate*, 85 Vt. 1, 80 Atl. 821; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442; *Boothe v. Fitzpatrick*, 36 Vt. 681; *Winefield v. Feder*, 169 Ill. App. 480. This is specially true in cases like this where the compensation has already been paid or otherwise provided for in writing.

In re Sutch's Estate, 201 Pa. St. 305, 50 Atl. 943; *Cornell v. Vamartsdalen*, 4 Pa. St. 364; *Gleason v. Dyke*, 39 Mass.

(22 Pick.) 390; *Goulding v. Davidson*, 26 N. Y. 604; *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266.

The complaint concerning the irregularity of the calls for the meetings is not well taken. They appear to have been in compliance with the constitution, by-laws or manual of the church as it is termed, for which reason we think it sufficient. Sec. 865, Rev. Stats., 1908, is not applicable to religious organizations. There being no statutory method provided, a compliance with their rules and regulations in this respect is sufficient.

Edgerly v. Emerson, 23 N. H. 555; *State v. Smith*, 48 Vt. 266.

The contention that the deeds were made in violation of a trust was not passed upon by the trial court. On this question it is only necessary to call attention to the facts that the conveyances to the church contain no declaration of trust; that the lots in controversy were not used for church or religious purposes, and while there may have been in the mind of the parson at the time they were purchased an idea for their ultimate use for bath house, gymnasium or other purposes as testified to, the evidence discloses that during the entire period the church held them, they were used for commercial purposes and the funds received therefrom applied to church purposes. In such circumstances had they been sold and the money used to carry on the religious work, no one could successfully contend that there was a breach of trust. This, in substance, was what was done, viz., they were conveyed to Parson Uzzell and his heirs in part payment for what the congregation considered was its debt incurred in carrying on the religious work for which the organization was incorporated. In *Lyons v. Planter's Loan and Savings Bank*, 86 Ga. 485, it is held that unless made exempt by statute a church building can be sold for the payment of the debt of the organization, including the minister's salary. In *Eggleston v. Doolittle*, 33 Conn. 396, it is held that the church building can be sold by the congregation for the payment of its debts.

The judgment will be reversed and the cause remanded with directions to dismiss the action.

Reversed.

Mr. Justice Bailey and Mr. Justice Allen concur.

No. 8846.

FINDING *v.* OCEAN ACCIDENT AND GUARANTEE CORPORATION.

1. *INSURANCE—Construction of Policy.* All ambiguities are resolved in favor of the assured.
2. — *Accident Policy Construed.* Insurance of the owner of a building against loss, by injury to any person in the car of an elevator, but excepting "any person engaged . . . in extraordinary repairs", but permitting ordinary repairs, "provided no elevator shall be run while it is undergoing such repairs." An employe of plaintiff was injured while riding upon the top of the car, engaged in cleaning the paint. *Held* not a repairing in the ordinary sense of the word, and that the insurer was liable.

Exceptions couched in words of doubtful meaning are not favored.

Error to Denver District Court, Hon. John H. Demison, Judge.

Messrs. HAYT, DAWSON & WRIGHT, for plaintiff in error.

Mr. JULIAN G. DICKINSON, and Mr. THOMAS E. WATERS, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS action is to recover upon an employer's accident insurance policy, designated as "an elevator liability policy," issued by the defendant in error to the plaintiff in error.

The complaint alleges that at a time within the life of said policy one of his employes, Henry Gitzen, while in an elevator well or hoist-way of an elevator upon the premises described in the policy, and to which said policy relates, sustained bodily injuries from which he immediately died. That due notice was served upon the defendant; that thereafter the widow of Gitzen brought suit and recovered judg-

ment against the plaintiff in the sum of \$5,000, which said judgment after appeal and affirmance by the Court of Appeals, the plaintiff paid. That said suit was defended by the defendant and through its counsel.

This action was to recover from the insurance company the amount of said judgment together with costs and expenses incurred.

The cause was tried to the court without a jury and judgment rendered in favor of the defendant.

The policy insured:

"Against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered while this policy is in force, by any person or persons while in the car of any elevator mentioned in the schedule hereinafter contained, or in the elevator well or hoist-way of same, or while entering upon or alighting from the elevator car. The foregoing General Agreement is made subject to the following Special Agreements, which shall be construed as conditions."

The special agreement upon which the defendant relies as exempting it from liability under the policy is as follows:

"This policy does not cover the loss from liability for injuries caused wholly or in part by: (A) Any elevator while in charge of any person contrary to law or ordinance, or any child under fifteen years of age; (B) Any elevator so constructed that it cannot be started, stopped and controlled by a person riding on the same; (C) Any person while making additions to, alterations in, or engaged in the construction, demolition or extraordinary repair of any such elevator or the building or structure in which it is contained; but ordinary repairs to any such elevator, its shaft or attachments, will be permitted provided no elevator shall be run or used while it or the shaft in which it is operated are undergoing repairs; (D) The explosion, collapse or rupture of any steam boiler."

The testimony shows that Gitzen was on and cleaning the top of the elevator at the time of the accident. That he had been so working while the elevator had made many trips. That he was cleaning off the paint by using a fluid applied with a brush to soften the paint, and then scraping it with a knife.

The only question at issue in the case is whether or not this work is to be construed as making repairs within the meaning of the special agreement or exception above quoted. In other words we must construe the work which Gitzen was doing to mean repairs within the plain meaning of the language of the policy.

It is a well settled rule that in case of ambiguity in any of the clauses of an insurance contract, such ambiguity is to be resolved in favor of the assured and against the insurance company. It was said in *Preferred Accident Ins. Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916. "It is now a well recognized rule that where the terms of a policy of insurance are not clear or are capable of two constructions, the one which is most favorable to the insured will be adopted."

Certainly in this case the most that can be said in favor of defendant's contention as to the clause under consideration is that it is capable of two constructions.

This rule is founded upon the fact that the contract is prepared by the insurance company, and for such reason no presumptions are to be indulged which favor the company. It is likewise held that the general purpose of the contract is full indemnity, and this should not be defeated except by clear and unambiguous limitations assented to by the parties. *Guarantee Co. v. Mechanics Savings Bank*, 80 Fed. 766, 26 C. C. A. 146.

Elaborating and citing authorities upon the rule of construction in case of insurance contracts, it is said in *Provident Life Assurance Society v. Cannon*, 103 Ill. App. 534;

"The construction of a contract for insurance as well as of other contracts is for the court. In the interpretation

of a contract, the purpose of the transaction between the parties must be rightly apprehended and the contract be so construed as to effect that purpose, if it be possible so to do, by giving to the language of the contract, as a whole, any reasonable meaning. In Phillips on Insurance at Sec. 124, it is said:

'The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in putting a construction upon the policy.'

In May on Insurance, Vol. 1, 3d. Ed., at Sec. 174, it is said:

'Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumably the intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give. * * * Conditions and provisos will be strictly construed against the insurers because they have for their object to limit the scope and defeat the purpose of the principal contract.'

In Wood on Fire Insurance, at Sec. 59, it is said:

'It is the duty of the insurer to clothe the contract in language so plain and clear that the insured cannot be mistaken or misled. * * * Having the power to impose conditions and being the party who draws the contract, he must see to it that all conditions are plain, easily understood, and free from ambiguity. * * * Failing to employ a clear and definite form of expression, the benefit of all doubts will be resolved in favor of the assured.'

In Vol 1, 2d Ed., Wood, p. 145:

'If there is any doubt, in view of the general tenor of the instrument of writing, whether the words used therein are to be taken in an enlarged or restricted sense, all things being equal, that construction should be taken which is most beneficial to the promisee. This rule of construction is especially applicable to the construction of policies of insurance.'

It will be seen from the authorities cited, that words used in such contracts must be construed as being used in the scope of their ordinary and accepted meaning. In this sense, cleaning or scraping off an old coat of paint, or even painting itself is in no sense synonymous with repairing.

Webster defines the word "repair" in the sense here used, as "to restore to a sound or good state after decay, injury, dilapidation, or partial destruction as to repair a house, a road, a shoe."

The word has been defined by courts and law writers as:

"A noun, a restoration to a sound state of what had gone into partial decay or dilapidation, or bettering what had been destroyed in part; restoration to a sound, a good or complete state after decay, injury, dilapidation, or partial destruction; restoration to a sound or good state after decay, waste, injury, or partial destruction; supply of loss; reparation; supply of loss; restoration after dilapidation. As a verb, to mend, to restore to a sound state what has been partially destroyed, to make good an existing thing; to restore to a sound or good condition, after injury or partial destruction; to restore to a sound or good state after decay, injury, dilapidation, or partial destruction; to replace or remake; to restore what has been impaired or injured; to restore to a sound state; to mend or refit; to mend, add to, or make over." 34 Cyc. 1336.

No authority is cited and we know of none where the words cleaning, scraping preparatory for painting, or even painting itself, has been construed as within the term "repairs." There are however authorities to the contrary.

In the English case of *Wood v. Walsh*, 1899 Q. B. Division 1009, where the question was directly involved as to whether a workman engaged in painting a house, was at a work of repair it was said:

"In other words, is painting the outside of a house to be considered as construction or repair within the ordinary meaning of those words? It is certainly not a work of construction; and, speaking for myself, I should certainly think

that neither construction nor repair of a house could mean merely outside painting. The arbitor has found in the present case that nothing was being done to the house but preparation for painting and the actual painting; would any one using language in its ordinary sense call painting the repairing of his house? If the legislature desired to bring this class of employment, which is a very well known one, within the purview of the Act, they would have done so in clear and unmistakable terms, instead of using language which, if given its ordinary meaning, operates to exclude it. The words "constructed or repaired" means some work relating to the structure of the building. On this point, I think that the true construction of the section is that repair does not include painting."

The question is quite comprehensively discussed in the case of *Smith v. German Insurance Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 268. The provision in the policy there involved, was that the insured was bound to obtain the indorsement of the company permitting repairs. It was there held that repairs require the services of a mechanic while the painting of a building does not. It was said:

"Webster defines the word 'Mechanic' as 'one skilled or employed in shaping and uniting materials, as wood, metal, etc., into any kind of structure, machine, or other object requiring the use of tools or instruments.' The American Encyclopedic Dictionary defines the term as 'one who is employed or skilled in the construction of materials, as wood, metal, etc., into any kind of structure or machine; one who is skilled in the use of tools or instruments; one who follows a mechanical trade for his living.' In Anderson's Law Dictionary the term is defined as 'a workman employed in shaping and uniting materials, such as wood or metal, into some kind of structure, machine, or other object requiring the use of tools.' In Crabb's English Synonyms the distinction between a mechanic and a painter is drawn as follows: 'The mechanic is that species of artisan who works at arts purely mechanical, in distinction from

those which contribute to the completion and embellishment of any objects. On this ground a shoemaker is a mechanic, but a common painter is a simple artisan.' It is apparent that the common acceptance of the term 'mechanic' does not include painters, and that painting was not intended by the terms of this policy to be included in those repairs which required the assent of the company to be indorsed upon the policy."

It is apparent that under the rules of construction applicable to insurance contracts as above stated we can not say that the special agreement relied on avoids the general indemnity under the policy, without doing violence to the generally accepted meaning of the words used in such special agreement.

The indemnity provision in the contract is broad, sweeping, and stated in language that can not be misunderstood.

There is no good reason why the exception or special agreements with which it is hedged about should not be written in language with equally explicit meaning, and with equal freedom from the necessity of interpretation or construction by a court.

The purchaser of an insurance policy is required to do no more than to read its provisions in the light of the ordinarily accepted meaning of its words and terms.

The law does not look with favor upon exceptions to the plain provision of indemnity, couched in language of doubtful and uncertain meaning, and courts will not supply by implication a meaning to such an exception, not clearly and unmistakably expressed by its terms.

The prayer of the complaint seeks to recover certain sums incurred in the former litigation and otherwise.

We think the amount to be recovered in this case is the sum of \$5,000, together with interest at the lawful rate from the date of payment thereof, to-wit: June 27th, 1913, by the plaintiff with costs, and the trial court is directed to enter judgment accordingly.

The judgment is reversed.

Hill, C. J., and Garrigues, J., concur.

No. 8853.

MOODY v. THE PEOPLE.

1. **CRIMINAL LAW**—*Embezzlement*, is common law larceny extended by statute to cases where the stolen goods come into the hands of the accused without a trespass.
2. — *Embezzlement of Writing—Information*. Where the thing embezzled is a writing it must be described with reasonable certainty, or a sufficient reason must appear for the omission of particularity. "One Bank Check of the value of" etc., "the property of" etc., held fatally insufficient.

Error to Denver District Court, Hon. William D. Wright, Judge.

Mr. C. A. IRWIN, Mr. EMORY S. IRWIN, for plaintiff in error.

Hon. LESLIE E. HUBBARD, attorney general; Mr. IRVING VANBRADT, assistant attorney general, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

DEFENDANT was convicted and sentenced to the penitentiary upon an information filed December 8, 1913, charging him with embezzlement. The property alleged to have been stolen is described as "one bank check of the value of \$3,800.00 of the personal property of Rosa Bruggebos."

Our statute (S. L. 1907, p. 342) provides:

"Whoever fraudulently converts to his own use money, goods or property of any other person, delivered to him, which is the subject of larceny, shall be deemed guilty of larceny and punished accordingly."

Embezzlement is common law larceny extended by statute to cover cases where the stolen property comes originally into the possession of the defendant without a trespass. The word implies a fraudulent or unlawful intent. One can not honestly embezzle any more than he can honestly steal. It differs from common law larceny only in the fact that there is no trespass in the original taking, but it is stealing.

It includes all cases where one intrusts the care of his property to another, as his agent, who fraudulently appropriates it to his own use, or fraudulently misapplies it. It is made to cover a class and kind of larceny where the property stolen comes into the hands of the defendant originally with the owner's consent, and the property embezzled must be described with the same certainty as in any indictment for common law larceny, and the proof must be in accord with the description, in the absence of a statute providing otherwise.

A written instrument which is the basis of larceny must be described with reasonable certainty, or there should be an averment showing why a more particular description can not be given. This rule requires that the instrument should be so set out that it may be identified and known, or there must be an averment showing good reason for not doing so, as that it has been destroyed, or is in the possession of the defendant. 15 Cyc. 514; 18 Ency. Pl. & Pr. 827; 2 Bish. Cr. Proceed. §§ 357-367; *State v. Marion*, 235 Mo. 359; 138 S. W. 491; *State v. Barbee*, 136 Mo. 440, 37 S. W. 1119; *State v. Kroeger*, 47 Mo. 530; *Taylor v. Territory*, 2 Okl. Cr. 1, 99 Pac. 628; *Patrick v. State*, 50 Tex. Cr. R. 496, 98 S. W. 840, 123 Am. St. Rep. 861, 14 Ann. Cas. 177; *Calentine v. State*, 50 Tex. Cr. R. 154, 94 S. W. 1061, 123 Am. St. Rep. 837; *McCarty v. State*, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152; *State v. Blizzard*, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366; *Langford v. State*, 45 Ala. 26; *State v. Baggerly*, 21 Tex. 757; *Bonnell v. State*, 64 Ind. 498.

"One bank check" is no more a compliance with the rule than "one check." A pleader could as well allege "one promissory note" or "one warranty deed." Where a written instrument is not the basis of the prosecution, but is only a step in the transaction, or an incident of the offense, a particular description is unnecessary, but where it is the basis of the offense, as in larceny, it must be described with sufficient certainty in the information to identify it.

The motion to quash should have been sustained.
Reversed and remanded.
Decision *en banc*.

No. 8954.

IN RE ESTATE OF BROWN, LUNATIC.

DISTRICT COURT—*Appeal from County Court—Jurisdiction*, section 11 of c. 173 of the Laws of 1915 is opposed to the provisions of sec. 23 of art VI of the Constitution and is void. The provisions of sec. 163 c. 181 of the Laws of 1903 (Rev. Stat. sec. 7254) are still in full force, and the District Court has jurisdiction of an appeal from the County Court in a controversy involving the estate of a lunatic.

Error to Denver District Court, Hon. Geo. W. Allen, Judge.

Mr. T. J. O'DONNELL, Mr. J. W. GRAHAM and Mr. CANTON O'DONNELL, for plaintiffs in error.

Mr. CHARLES A. MURRAY, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

ON the 24th day of November, 1915, the defendant in error, as conservator of the estate of James W. Brown, insane, filed his petition in the County Court of the City and County of Denver, praying for an order directing him to sell all the real estate of the lunatic, consisting of an undivided one-twenty-fourth ($1/24$) interest in certain mining property, in Lake County, Colorado, to-wit: the Gordon and Bengal Tiger lode claims, and known as the Gordon-Tiger mining property, fully described in the petition.

The merits of the controversy are not involved in this proceeding, and it is necessary only to state the nature of the action.

The plaintiffs in error filed objections to the petition for reasons stated therein.

On the 20th day of January, 1916, the plaintiffs in error filed their petition in the same court, praying the removal of Niles as conservator, and for the appointment of a successor, to which petition the conservator duly filed his answer.

The two petitions, together with the protest to the one, and the answer to the other, were heard together, and on the 3rd day of April, 1916, orders were entered denying the petition of the heirs, asking for the removal of the conservator, and granting the petition of the conservator to sell the real estate.

To the entering of these orders the heirs duly objected and an appeal was taken to the District Court in the manner provided by the statute in such case.

On the 21st day of April, 1916, the conservator filed in said District Court his motion to dismiss the appeal in the following words:

"Comes now the above Conservator, by Chas. A. Murray, his attorney, and moves the court to dismiss all proceedings herein in this court, and the appeals from the County Court to this court herein, and to remand all matters to the County Court, from which they originated, for the reason that no appeal lies from the County Court in the matters involved herein, and this court has therefore no jurisdiction over these proceedings, or over the matters involved therein."

This motion was sustained by the court, the appeal dismissed, and this order and judgment is now before us for review.

The appeal was taken in compliance with section 163 of chapter 181, Laws 1903, which section provided that all questions of law and fact, relating to probate matters, or arising in proceedings under the act, shall be determined by the County Court, with the right of appeal from all final judgments to the District, with the right of review by the Court of Appeals or the Supreme Court, with which section the plaintiffs in error fully complied in this case. But by

section 11, chapter 173, Laws 1915, the said section was amended so as to read as follows:

"Section 163. All questions of law and fact relating to probate matters arising in the proceedings under the statutes on wills and administration of estates, or any portion thereof, in any county, shall be determined by the County Court of such county, unless at the time that application is made to have such questions set for hearing, or heard, the parties interested in the determination of such questions shall stipulate that such questions be certified to the District Court of the proper county, for its determination; or unless in the event that such stipulation is not made by the parties interested in the determination of such questions, the judge of the County Court shall order that such parties have such questions certified to the District Court of the proper county for its determination, or agree that such questions shall be disposed of by the County Court subject only to review by such order of disposition thereof by the Supreme Court. Whenever any such question has been certified to the District Court and has been determined therein, the clerk of such District Court shall, within ten days after such determination, transmit to the clerk of the County Court a transcript showing the disposition of such question, whereupon such County Court shall proceed in accordance with such finding, order or disposition thereof by such District Court, unless such District Court shall be superseded by the Supreme Court."

It will be observed that by this section all questions of law and fact, arising in probate matters, shall be determined by the County Court, unless: First, the parties interested in the determination shall stipulate that such questions be certified to the District Court for determination; or, second, unless in case such stipulation is not made, the judge of the County Court shall order that such questions be certified to the District Court for determination; or, third, or that the parties shall agree that such questions

shall be disposed of by the County Court, subject only to review by the Supreme Court.

In this case no such order or agreement was made, and the County Court determined the matter.

It was therefore held by the District Court that, in view of said amended section 163, it was without jurisdiction to entertain an appeal from the judgment of the County Court.

It is contended by the plaintiffs in error that the amended section 163 of the Act of 1915 is invalid in that it is in violation of Section 23, Art. 6, of the Constitution, which provides as follows:

"County Courts shall be courts of record and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians, conservators and administrators, and settlement of their accounts, and such other civil and criminal jurisdiction as may be conferred by law."

The Constitution nowhere vests original jurisdiction of probate matters upon any other court, and it is a well settled principle of the law that where a Constitution confers jurisdiction over a particular subject matter upon one court, and not upon another, the jurisdiction thus conferred is exclusive. *The People v. Richmond*, 16 Colo. 274-286, 26 Pac. 929.

The County Court under the Constitution and in the very nature of things is primarily a Probate Court.

The section of the statute complained of clearly divests the County Court of jurisdiction to determine all controversies in probate matters. It is therefore in plain violation of the provision of the Constitution which confers original and exclusive jurisdiction upon that court to determine such matters. Under the section the parties by agreement may divest the County Court of jurisdiction in all controverted probate matters, and confer that jurisdiction upon the District Court, and that the judge of the County Court, contrary to the will of the parties, may order the parties to so stipulate to divest the County Court

of such jurisdiction, or that the District Court shall be denied jurisdiction of appeal to the District Court.

It is true that the section does not provide for the transfer of the whole case, but for the transfer and determination of all questions of law and fact, and to cause to be certified to the County Court its conclusions upon such questions of law and fact.

But to take from a court the power to hear and determine all questions of law and fact is to deprive it of the very essence of jurisdiction of the subject matter of the controversy. Indeed, both lexicographers and law writers define the term "jurisdiction," as used in the law, as the power and authority to hear and determine. 24 Cyc. 375; 11 Cyc. 660.

It is well settled that the authority to hear and determine is jurisdiction to try all the questions involved in the controversy, and that if a court legally obtains jurisdiction of the parties and the subject matter, it may decide all questions arising in the cause, and its decisions are binding until reversed by a competent court. 11 Cyc. 677.

It has likewise been held that the power to construe wills, or to inquire into their validity and legal effect, and to determine the rights of the parties thereunder is conceded to probate and like courts where the exercise of such power is necessarily incidental to the carrying into effect the powers expressly granted over the administration, settlement and distribution of estates. 11 Cyc. 680 and authorities cited. The Constitution having expressly conferred original and therefore exclusive jurisdiction upon the County Court to determine all matters of probate, it is not within the power of the Legislature to direct that the parties interested in such a case may or shall by agreement divest that court of such jurisdiction and confer it upon another and different court, nor to empower the court to divest itself of such constitutionally imposed power.

It is held generally, both in England and the United States, that the lawful jurisdiction of courts can not be

ousted by the private agreements of individuals, and that such agreements are illegal and void as against public policy. 7 R. C. L. p. 1046.

It is also a well recognized principle that where the judicial power of courts, either original or appellate, is fixed by constitutional provisions, the Legislature can not either limit or extend that jurisdiction. *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580; *McKennon v. Hall*, 10 Colo. App. 291, 50 Pac. 1052.

The constitutional provisions of the State of Idaho as to the jurisdiction of District and Probate Courts are nearly identical with those provisions in the Colorado Constitution, except that in the section of the Idaho Constitution relating to Probate Courts there is omitted the words, "and such other civil and criminal jurisdiction as may be conferred by law."

The Idaho provisions are as follows:

"The District Court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law." (Sec. 20, Art. 5.)

"The Probate Courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and appointment of guardians." (Sec. 21, Art. 5.)

In *Estate v. McVay*, on rehearing, 14 Idaho 64, 93 Pac. 31, discussing the subject now under consideration, it was said:

"An examination of Secs. 20 and 21, Art. 5, of the Constitution, discloses at once the fact that the framers of that instrument saw fit to classify 'matters of probate, settlement of estates of deceased persons and appointment of guardians' as separate, distinct and aside from 'cases at law and in equity,' over which they gave the District Court original jurisdiction. It will also be seen from Sec. 20 that 'in all cases, both at law and in equity,' from which they have clearly distinguished 'matters of probate, settlement of estates of deceased persons, and appointment of guard-

ians,' the District Court has 'original jurisdiction,' and that in all other matters which the Legislature might provide for being heard in District Courts, the jurisdiction should be solely 'appellate.' The words 'original jurisdiction,' and 'appellate jurisdiction,' as employed in Sec. 20, are used in the clearest and most unequivocal contra-distinction to each other. By Sec. 21, the Probate Courts are given the sole and exclusive 'original jurisdiction' in all matters of probate. As to those matters the Probate Court is a court of record, to the judgment, records and proceedings of which, in such matters, absolute verity is attached in every respect as fully and completely as can attach to the records, judgments and proceedings of District Courts or other courts of record. (*Clark v. Rossier*, 10 Ida. 348, 78 Pac. 358, 3 Ann. Cas. 231.) Under Sec. 20, Art. 5, of the Constitution, the Legislature is the sole and exclusive judge as to the extent and scope of the 'appellate jurisdiction' that they will confer upon District Courts. In other words, they may limit it to any case or class of cases, or subject matter they may see fit, or they may not grant any at all; but it was never intended by this or any other provision of the Constitution that the Legislature could circumvent the clearest provisions and intent of that instrument, by giving to the District Court, under the guise of the right to try appeals, what amounts to an original jurisdiction to hear and determine matters of probate and settlement of estates of deceased persons."

The opinion in the case of *Stevens v. Meyers*, 62 Ore. 372, 126 Pac. 29, contains a very instructive discussion, confirmatory of the principle we have adopted. It was there said:

"But another and conclusive reason why the tax here imposed can not be justified under the section of the Constitution quoted is that the settlement of estates in courts having probate jurisdiction is essentially proceedings *in rem*, and not 'civil suits commenced and prosecuted' within the meaning of the Constitution. It is upon this theory that

the Federal Courts have uniformly disclaimed jurisdiction in probate matters, since such jurisdiction is not conferred by the words, 'the judicial power shall extend to all cases in law and equity arising,' etc. Sec. 2, Art. 3, Const. U. S."

We must therefore hold that amended section 163, Laws of 1915, is invalid as being in conflict with section 23, Art. 6, of the Constitution. The judgment of the District Court is reversed, with instructions to overrule the motion to dismiss and to determine the appeal on its merits.

En banc.

White, J., concurs in the conclusion.

No. 8944.

FEE v. WELLS.

1. EVIDENCE—*Parol Inadmissible.* Declarations of the insured in a life policy are not admissible to vary the terms of such policy as to the beneficiary, or create a trust as to the proceeds in favor of a third person.
2. — *Admissions.* Statements of the beneficiary in a life policy that she intends to apply the proceeds to the benefit of another are not sufficient to establish a trust in such proceeds.
3. LIFE POLICY—*Trust in Proceeds.* Conversations of the beneficiary in a life policy with a stranger, alleged to have occurred long before the trial, and the accuracy of which depends on the recollection of the witness, are not sufficient to establish a trust in the proceeds of such policy; but may be considered in connection with other evidence tending to show a trust previously created by the insured.

The proceeds of the policy are a property right in the beneficiary therein, and a trust in such proceeds in favor of another must be established beyond a reasonable doubt.

Error to Denver District Court, Hon. H. S. Class, Judge.

Messrs. DANA & BLOUNT, for plaintiff in error.

Messrs. MELVILLE & MELVILLE, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

PLAINTIFF and defendant are daughters of Mrs. Wells, deceased, and the action was brought by Miss Wells, as plaintiff, against her sister, Mrs. Fee, as defendant, to impress a trust in favor of plaintiff, who was an invalid, upon the proceeds of a life insurance policy, paid defendant, upon the life of their mother, who died July 23, 1914. For ten years prior thereto Mrs. Wells carried a policy in the Prudential Life Insurance Company of America, insuring her life in the sum of \$1,000. Her estate was the original beneficiary. In 1909 her son Fred was named beneficiary, and in August, 1912, about two years prior to their mother's death, Mrs. Fee was named beneficiary, and the proceeds were paid to her August 5, 1914.

It is alleged in the complaint that, since January 1, 1914, the insured desired the proceeds to go to plaintiff instead of the beneficiary; that May 15, 1914, in accordance with this desire, the insured and the beneficiary (Mrs. Fee) orally agreed that, upon the former's death, and payment of the insurance, defendant would receive the proceeds in trust for the use and benefit of plaintiff; that defendant accepted the trust, and the insured consented to defendant's being retained beneficiary on account of such agreement; that defendant took advantage of her position as trustee, and after the proceeds were paid, failed and refused to carry out the trust agreement.

November 24, 1915, defendant answered, admitting she was the beneficiary, and that the proceeds were paid to her. She then alleged that, about two years prior to her mother's death, the insured, of her own free will and act, requested the insurance company to name defendant beneficiary; that the change was made by the company, and the policy delivered to her by the insured with the intention that it should become her absolute property, and denied any subsequent trust agreement covering the proceeds.

July 24, 1916, the jury returned a verdict in damages for plaintiff, upon which the court pronounced judgment.

One Mrs. Hubbel, a witness for plaintiff, testified that in June, 1914, she had a conversation with defendant. Witness said: "Mrs. Fee remarked to me, it was a good thing her mother had left this money in trust for Gertrude, because if she had not, somebody would have gotten it away from her. I says: 'You certainly will see that Gertrude gets every cent of it.' She says: 'Absolutely every cent. Mother knew what she was doing.' I says: 'You will see that she is taken care of?' She says: 'Mother knows I will look after Gertrude.'"

One Mrs. Crawford, another witness for plaintiff, testified that she had a conversation with defendant in December or the latter part of November, 1913, regarding the insurance policy. Witness testified: "She told me that her mother had made this policy to her to pay the bills after she was gone, and to take care of Gertrude. She said her mother had left the policy in her name for the purpose of having it go to Gertrude."

Another witness by the name of Mrs. Griffith testified for plaintiff that in June, 1914, she had a conversation with defendant. Witness said: "She said she had convinced her mother that if she changed the policy to any one else, she could not be sure that Gertrude would get the money, but if she left it in her name, as it was at that time, she would always see to Gertrude, and carry out her wishes. She said she had just told her mother that."

This is all the evidence there was to establish a trust agreement.

Defendant, as a witness in her own behalf, denied that when she was made beneficiary in August, 1912, any trust whatever was created, or that any trust was thereafter created or agreed upon, and denied the alleged conversations testified to by the three witnesses.

1. This is an attempt, by oral evidence, to fasten an express trust, for the use of one other than the beneficiary, upon the proceeds of a life insurance policy. It is an equitable action triable to the court, but it does not seem from

the meager record that the case was tried in accordance with usual equity practice, but was submitted to a jury which returned a verdict in damages for plaintiff, upon which the court pronounced judgment.

There is no complaint about the procedure, however, and we will review the case as presented.

2. There is no claim or evidence that the beneficiary declared a trust and constituted herself trustee. The complaint alleges the insured created the trust, to which Mrs. Fee consented, and agreed to act as trustee. There is no claim or evidence that the trust was created before or at the time Mrs. Fee was named beneficiary in August, 1912, or that she was named beneficiary upon any trust agreement or condition whatever, or upon any terms to pay the proceeds to any one else. In other words, if a trust was created it was by the insured in 1914, some two years after Mrs. Fee was named beneficiary. So the controlling question is whether, after the beneficiary was named, the insured created a trust in the proceeds in which the beneficiary concurred and agreed to act as trustee.

3. Defendant claims that an oral express trust could not be created in the proceeds. We will assume, however, for the purposes of the case, but not decide, that with the consent of the beneficiary, who agrees to act as trustee, the insured could create an oral express trust, without change of beneficiary, after issuing and delivering the policy to the beneficiary.

4. If a trust was established, it was an oral express trust, created by the insured as distinguished from implied, resulting or presumptive trusts. But there is no evidence that the insured created a trust. By this we mean there is no testimony regarding a trust created by the insured except reported conversations with the beneficiary, out of court, by three witnesses who were strangers to the transaction. Of course, such evidence is hearsay, and ordinarily inadmissible, but it was admitted, under an exception to the rule, upon the ground of declarations against

interest. There is no other proof of an agreement in the first place between the insured and the beneficiary to create a trust. No witness testified to any conversation or agreement between the insured and the beneficiary, nor to any declaration or statement of the insured. Plaintiff, though a witness in her own behalf, did not claim that she had been informed by either of a trust agreement, though she frequently saw her sister, and was with her mother almost constantly.

5. We said there was no evidence of any declaration or statement by the insured. The witness, Hubbel, was asked to repeat a conversation she had with the insured in June, 1914. The question was general and not confined to the issue. It was objected to and the objection sustained, to which cross-errors are assigned. Waiving any irregularity in the form of the question, the objection was properly sustained. Evidence of the insured's oral declarations made to strangers in June, 1914, were inadmissible to vary the terms of the policy. The beneficiary was named in August, 1912, and the policy delivered to her then, and declarations of the insured to strangers, if admissible to vary its construction, should be at a time prior thereto. That is what is meant when we say there is no evidence of any declarations of the insured that she created a trust.

The creation of a trust in the proceeds by the insured, without change of beneficiary, to be binding upon the beneficiary, must be before or contemporaneous with issuing the policy. After Mrs. Fee had been named beneficiary and the policy delivered to her, it was too late to fasten a trust upon the proceeds by any declaration of the insured. Oral declarations of the insured to strangers after Mrs. Fee was named beneficiary, and the policy delivered to her, will not be received for the purpose of creating a trust in the proceeds. The presumption arising from naming Mrs. Fee beneficiary could not be overcome by the oral declarations of the insured to strangers thereafter. *Wason, Admr., v.*

Colburn, Admr., 99 Mass. 342-344; *Reed v. Liphart*, 177 Ill. App. 645.

6. The witness Crawford's evidence that defendant told her in November, 1913, that her mother had made the policy to her to pay the bills after she was gone, and take care of Gertrude, is not an admission of a trust. Where there is no proof whatever of the creation of a previous trust, statements of the beneficiary that she intended to use the proceeds for a certain purpose are not sufficient to prove a trust. *Wason, Admr., v. Colburn, Admr.*, 99 Mass. 342; *Reed v. Liphart*, 177 Ill. App. 645.

But, aside from this, her evidence must be disregarded for other reasons. If it tends to establish anything regarding a trust, it is that a trust agreement was entered into in August, 1912, at the time Fee was named beneficiary. No such an agreement was pleaded or claimed, and in the next place it is absurd on its face to make such a claim, because if the insured, when she named Mrs. Fee beneficiary in August, 1912, intended to make plaintiff beneficiary, she would have named her beneficiary, and not the defendant.

7. It is claimed in argument that plaintiff proved the creation of a trust by the insured, to which the beneficiary consented, and agreed to act as trustee, or proved that a trust agreement was entered into between the insured and the beneficiary. Reported conversations between the beneficiary and strangers to the transaction, long before the trial, are the only evidence tending to prove the existence of such a trust.

When the proof offered to sustain an oral express trust in the proceeds of a life insurance policy, without change of beneficiary, consists in nothing but reported conversations by the beneficiary with strangers long before the trial (which are denied), the accuracy of which depend entirely upon the uncertain memory or recollection of witnesses as to the exact language used in conversations, such evidence alone is insufficient. The claim should be based upon some evidence in the first place that a trust was created. The

hearsay evidence of these witnesses, called declarations against interest, is insufficient alone to prove that a trust had been previously created by the insured. Such statements, alone, can not be relied upon as creating a trust in the first place, but may be considered in connection with other evidence tending to establish the fact that the insured had previously created a trust. *Frazer v. Phoenix Nat. Bank*, 161 Ky. 175-182, 183, 170 S. W. 532.

In civil cases one can not be held liable upon a claim based solely upon hearsay conversations against interest with strangers, without some proof to establish that such a claim previously existed, of which the declarations are corroborative, any more than in criminal law one could be convicted of murder upon the declaration that he had murdered a person, without some proof in the first place that the person had been murdered.

8. Proceeds of a life insurance policy are a property right, and before the beneficiary can be divested of the title, use and enjoyment thereof by mere reported statements made out of court to strangers, upon the ground that they are statements against interest, the evidence will be received with great caution, and the proof must be beyond a reasonable doubt. The presumption arising from making Mrs. Fee beneficiary must prevail until the contrary is established beyond a reasonable doubt. *Skeen et al. v. Marriott*, 22 Utah 73, 61 Pac. 296; *Ferguson v. Robinson*, 258 Mo. 113-133, 167 S. W. 447.

Viewed in this light, the evidence, consisting merely in the repetition of alleged oral statements or conversations with the beneficiary, is not of that clear and convincing character required in such cases. *Ferguson v. Robinson*, 258 Mo. 113-133, 137, 167 S. W. 447.

Evidence to establish an oral express trust for the use of one, other than the beneficiary in the proceeds of a life insurance policy, without change of beneficiary, should be equally as strong as parol evidence to establish a resulting trust in real property, regarding which, see *Freeman v.*

Peterson, 45 Colo. 102, 100 Pac. 600, and cases cited. The proof must be beyond a reasonable doubt, and the language used must be clear and explicit as to the declaration or creation of the trust. In the instant case the evidence of the two witnesses is not as a matter of law so clear and convincing as to satisfy the mind beyond a reasonable doubt that the insured created a trust in the proceeds of the policy.

Plaintiff was an invalid, and the case presents some hard features, but because of this we can not establish a bad precedent which might in the future open the door to fraud to such an extent as would be liable to endanger the title of beneficiaries in life insurance policies.

The judgment of the District Court is reversed and the cause remanded.

Reversed and remanded.

Chief Justice Hill and Mr. Justice Scott concur.

No. 9023.

LUXFORD v. CITY AND COUNTY OF DENVER.

MUNICIPAL CORPORATIONS—*Railroad Grade in Street—Liability for Injury to Private Property.* A city is not liable for an injury to private property occasioned by a railway grade authorized by the city in a public street, even though attributable to the omission by the company to provide means of drainage as stipulated for in the ordinance authorizing such grade.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

Mr. HALSTEAD L. RITTER, for plaintiff in error.

Mr. JAMES A. MARSH, Mr. JACOB J. LIEBERMAN, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS action was brought to recover damages caused by the Cherry Creek flood of July, 1912. The trial court sustained

a general demurrer to the complaint. Plaintiff having elected to stand by his cause as therein made, a judgment of dismissal was entered, and he brings the cause on error for review.

The essential facts, which upon demurrer must be taken as true, are as follows: In 1887 The Burlington & Colorado Railroad Company obtained a franchise to construct and operate a railroad across Corbett Street, a regularly established highway in the City of Denver. An embankment approximately five feet high was erected across the end of the street, and the rails laid thereon. No culverts or other means of drainage were provided in the embankment, although by the terms of the franchise they were especially stipulated. The Chicago, Burlington & Quincy Railroad Company is the successor to the original corporation.

On July 14, 1912, an extraordinary and unusual rainfall occurred in and around Denver and along Cherry Creek, causing that stream to overflow its banks and run into and down Corbett Street toward the Platte River. This flow was checked at the embankment in question, causing the water to back up into the basement of a warehouse owned by The Benedict Warehouse & Transfer Company, injuring a quantity of goods stored there. The claims of the several owners were duly assigned to plaintiff.

The cause of action is predicated upon the theory that the embankment was a nuisance, an inherently dangerous thing, and to the construction of which the city had neither the right nor authority to consent. That it was the duty of the city to abate such nuisance, and that its continued existence was a concurrent cause with the flood in producing the damage of which complaint is made.

Both upon principle and authority, the railroad grade across Corbett Street was not a nuisance *per se*. It was not an agency inherently dangerous. The right of the railroad company to use the street having, as is conceded, been lawfully granted, such use certainly, in and of itself alone, can

not constitute a nuisance. The embankment had been in existence for more than thirty years prior to July, 1912, and, so far as the record shows, no claim had ever been made that it constituted a nuisance or was in any way a menace to personal or property rights. It is well settled that the authorized use and occupancy of city streets by a railroad company does not necessarily constitute a nuisance. *State v. Louisville, etc., Railroad Company*, 86 Ind. 114; *Danville, etc., Railroad Company*, 73 Pa. St. 29. The rule is stated in *Denver, etc., Railroad Company v. Hannegan*, 43 Colo. 123, at page 126, 95 Pac. 344, as follows:

"The city authorities could authorize occupancy and use thereof (the streets) for railway purposes, although it is a servitude not strictly within the ordinary uses of a public street. And the effect of the grant to The Denver Circle Railway Company by the ordinance of January 28, 1881, was to render legal such occupancy and use and avoid any claim by the city for damages through resulting inconvenience to the general public. Moreover, so long as the grantee or its successors limited such occupancy and use to proper and legitimate railway purposes, conducting the same in accordance with the provisions of the ordinance, no action could be maintained by any one upon the ground that such occupancy and use constituted a nuisance."

There is no allegation in the complaint that the use of the street has not been limited to proper and legitimate railway purposes, or that such use constituted a nuisance although, as already noted, it has been so used for upwards of thirty years.

The granting of a right by a municipality to a railroad company to occupy streets creates no liability in favor of third persons against the municipality for the damages occasioned by the corporation because of the bare exercise of the right so granted. As was said in *Green v. Portland*, 32 Me. 431, at page 433:

"The railway was not built with the funds of the city or by its order, or by its officers. The city has received no

rent, income or benefit from it. It has no other connection with it, than to grant the owners of it a license to build and continue it on its streets. It might well take the bond of indemnity to protect it from damages, for which would be liable by statute for direct injuries there occasioned to the persons or property of individuals. The fact that the city took such bond does not increase its liability, or make it responsible to those who in some other manner have suffered damages from it. It does not even impliedly authorize them to do any damage to others.

"The license amounts to nothing more than an authority, so far as the city is concerned, to do the acts for their own benefit and upon their own responsibility, without being submitted to interruption or complaint by the city. If one person license another to pass over his land without compensation, for his own convenience or benefit, he does not thereby constitute him his agent for that purpose. Nor would he thereby become liable to third parties for injuries suffered by them in consequence of the acts done under such license. * * * If it had the power to grant such a license, it must have derived it from its general powers to regulate its own corporate rights and interests. And those powers would not authorize it to make itself responsible for the acts of others from which neither it, nor its citizens, derive any benefit, and which were not done for the accommodation of the public travel and business. Upon the case as presented, the city does not appear to be responsible for any damages which the plaintiffs may have suffered."

In Elliott on Streets and Roads, 3rd ed., vol. 2, sec. 390, page 522, it is said:

"In granting a right to occupy a street by a railroad track, a municipal corporation exercises a delegated governmental power, and for the bare exercise of such a power is not liable to abutting owners. It is evident that the exercise of a governmental power can not, of itself, subject the municipality to private action, but if the municipal

corporation should join the railroad company in doing an act which would so impair the easement of access, or so injure the abutting property as to cause the property owner special damages, then it may be that the owner could maintain his action for damages. Where, however, no more is done than the enactment of an ordinance granting the privilege of occupancy, it seems quite clear that no private action would lie against the municipality for damages."

The principle announced in the authorities above quoted is approved and applied in the following cases: *Burkham v. Ohio & Miss. Ry. Co.*, 122 Ind. 344, 23 N. E. 799; *Frith v. City of Dubuque and C., D. & M. R. Co.*, 45 Iowa 406; *Terry v. Richmond*, 94 Va. 537, 27 S. E. 429, 38 L. R. A. 834; *Dillenbach v. City of Xenia*, 41 Ohio St. 207; *Tatman v. City of Benton Harbor*, 115 Mich. 695, 74 N. W. 187; *Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859; *Laager v. City of San Antonio*, (Tex. Civ. App.) 57 S. W. 61; *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307; *Murphy et al. v. C., R. I. & P. Ry. Co.*, 247 Ill. 614, 93 N. E. 381. The basic question involved has been frequently before this court and, in principle, has been determined in harmony with the decisions cited.

In *City of Denver v. Bayer*, 7 Colo. 133, 2 Pac. 6, this court discussed the liability of a municipality for damages to abutting property owners by construction of a railroad upon the public streets. The road had been built under an ordinance identical with the one under which the track here involved was constructed. In its opinion on the questions involved the court, on page 126, said:

"If the city council determine to make some change in the street for the benefit of the public, and proceed to do the work, the contractors or employees would be the city's agents; for injuries arising from their unskilfulness or negligence, the municipality would unquestionably be liable. But the construction of the ordinary railroad is not, as we have found, an improvement of the street for the conveni-

ence and benefit of the local public; it is a private enterprise, for private profit. True, the city attaches certain conditions to the license granted, such as that the road-bed shall be upon a certain grade, that culverts shall be constructed for the gutters, and planks laid at the crossings. But otherwise the municipal authorities do not control the enterprise. Whether we term the railroad company purely a private, or whether we call it a *quasi* public corporation, the situation remains unchanged. In constructing and operating the road, it is acting for itself and not for the city. * * * If the railroad company disobeys the law in building or operating its road, the city is no more responsible therefor than it would be for a tort of the private individual in the pursuit of his business aforesaid."

So, also, in *Sorenson v. Town of Greeley*, 10 Colo. 369, 75 Pac. 803, where a railroad company, in constructing its tracks under grant from the municipality, destroyed a flume belonging to plaintiff, this court, citing *Denver v. Bayer*, said:

"In no view of the case can the town be held liable for the injury resulting from such disturbance of the flume and lateral of the plaintiff. The granting of a right of way on a street for a railway by a municipality does not create a liability against the municipality for the damages occasioned by the corporation exercising the rights so granted. The liability in such cases is against the corporation exercising and enjoying such rights."

The rule is approved in *Town of Idaho Springs v. Woodward*, 10 Colo. 104, 14 Pac. 49, and *Town of Idaho Springs v. Filteau*, 10 Colo. 105, 14 Pac. 48.

The latest pronouncement of this court on the question is in *City of Colorado Springs v. Stark*, 57 Colo. 384, 140 Pac. 794, 796. On page 388 the court distinguishes the cases cited above from the one then at bar, as follows:

"These decisions are based upon the broad and equitable principle that those who reap the benefits of improvements must bear the burden of compensation for any loss occa-

sioned in securing them. They depend upon the proposition that where the use innures primarily to the profit and advantage of individuals, or to private or *quasi* public corporations, just compensation for injury thereby occasioned must be made to the abutting property owner by those so benefitted."

The grade in question was constructed exclusively for the profit, benefit and advantage of the railway company, and not for the benefit of the public. The case is therefore ruled by our own decisions and the liability to the plaintiff, if any, is that of the railroad alone, which can not by any legitimate reasoning be properly saddled upon the city.

Denver v. Aaron, 6 Colo. App. 232, 40 Pac. 587, relied upon by plaintiff, is based upon the failure of the municipality to perform its affirmative duty to keep its streets in a reasonably safe condition for travel. That question is not even remotely involved in this controversy and that decision has no application here, as the case is not analogous, either in facts or principles of law, to this one. If this were an action wherein damages were sought because of the injury resulting from the obstruction of a street through the failure of the city to keep the same in a reasonably safe condition for travel, a different question would be for consideration. Cases of that sort present questions of the failure of the municipality to perform some specific, affirmative duty placed upon it by law, and that decision states no principle applicable to or controlling upon the facts of this case.

The judgment of the trial court is right, and should be, and is, accordingly affirmed.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9034.

CRAIG v. DEWEY ET AL.

1. LUNATIC—*Non-Resident—Ancillary Conservator.* An ancillary conservator for a non-resident lunatic, was ordered, there being no reason for his continuance, to turn over the estate in his hands to the guardian appointed at the home of the lunatic.
2. INTEREST—*Money Wrongfully Detained.* Dewey, the conservator of a non-resident lunatic, refused to turn over to the guardian appointed at the home of the lunatic, moneys in his hands pertaining to the estate. A portion of these moneys was upon deposit in a bank of which Dewey was the cashier, evidenced by certificates of deposit which bore the legend "no interest after maturity". Both Dewey and the Bank were held liable to the foreign guardian, for interest upon the certificates of deposit from the day of demand, also for interest, from the same date, upon an open account in the bank; and Dewey was held liable for interest, which he had collected, on certain bonds pertaining to the estate.

Error to Clear Creek County Court, Hon. Royal R. Graham, Judge.

Messrs. HUGHES & DORSEY, Mr. BERRIAN HUGHES, Mr. E. I. THAYER, for plaintiff in error.

Mr. E. M. SABIN, Messrs. FILLIUS & FILLIUS, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS suit was brought to compel the conservator of the Colorado estate of Carrie Rohan, lunatic, to turn over the funds in his hands to the guardian of her person and estate in Missouri. Findings and decree were against the petitioner, Craig, the Missouri conservator, and he brings that judgment here for review.

The property of the estate in Colorado consists of three lots in Kremling, Grand County; five three per cent government bonds in the denomination of \$1,000.00 each; four certificates of deposit in The Bank of Clear Creek County, aggregating \$15,530.31; and \$940.00 deposited in that bank, subject to the check of Frederick P. Dewey, the conservator

in Colorado. The total amount of personal property involved is \$21,634.97.

It appears that the Rohans first established a domicile in Missouri in 1866. They came to Colorado in 1889, removed to Arkansas in 1902, thence to Kansas, where, in 1904, Carrie Rohan was adjudged insane and committed to an asylum, her husband being appointed guardian of her person and estate. She was adjudged sane in 1905, and returned to Colorado, her husband then removing to Missouri. She returned to her husband after a short absence, then again left him, returning to Kansas, where she was again adjudged insane, and her husband was again appointed her guardian. Rohan later returned to Missouri. Carrie Rohan was adjudged insane by the Colorado court in August, 1908. Her husband died at his home in Missouri in 1913. Another was appointed to succeed him as conservator of the estate of the wife in Kansas, and plaintiff in error Craig, who is the public administrator and guardian of Johnson County, Missouri, was made guardian of the person and estate of the incompetent by the Missouri court. Frederick P. Dewey, one of the defendants in error, was appointed to succeed him as conservator of the estate of this woman in Colorado. Dewey at all times herein referred to was cashier of the bank, the other defendant in error.

Upon a showing that Mrs. Rohan was a resident of Missouri, the Kansas conservator was discharged, and the custody of her person and estate surrendered to Craig. In 1914 she was adjudged insane and committed to the state asylum in Missouri. In his capacity as guardian, Craig presented the certificates of deposit to the defendant bank for payment, and made demand upon it, and upon Dewey, for the assets of the estate in their possession. Payment was refused by the bank and Dewey declined to surrender any of the property. Craig thereupon brought this suit.

The questions involved are the right of the domiciliary guardian to have transferred to him the property of Mrs.

Rohan in this state, and the liability of the bank and Dewey for interest on the funds wrongfully retained in their possession.

In disposing of the first question, the sole matter to be considered is the welfare of the ward. It appears that no claims have ever been filed against the property in this state, and that no citizen of Colorado, save the bank and Dewey, has the slightest interest or object in keeping her funds within this jurisdiction. As above noted, approximately \$16,000.00 of the estate funds is deposited in the bank, of which Dewey is cashier. As matter of fact, there appears to be no reason why the ancillary administration should not be closed, and the funds turned over to the duly appointed and qualified public administrator in Missouri, except that by so doing the bank would be deprived of some \$16,000.00 of deposits. The Missouri guardian is a public official, duly appointed to act in such cases; his bond is more than double the amount of the estate; he is the guardian of the person of the incompetent, as well as the conservator of her property; she is a resident and citizen of Missouri, and has been committed to a state institution there. There are, or can be, no active duties devolving upon an ancillary guardian, anywhere, which can not be just as satisfactorily, and economically, and efficiently, performed by the Missouri official. Under such circumstances the continuance of ancillary guardianship in Colorado is an unnecessary expense to and burden upon the estate.

In the following cases, upon analogous facts and conditions, ancillary administration was closed and the estate surrendered to the domiciliary guardian: *Bowles v. Troll*, 190 Mo. App. 108, 175 S. W. 324; *Langmuir v. Landes*, 113 Ill. App. 134; *In re Holcomb*, 111 Iowa 525, 82 N. W. 1000; *Watt v. Allgood*, 62 Miss. 38; *Earl v. Dresser*, 30 Ind. 11, 95 Am. Dec. 660; *Marts v. Brown*, 56 Ind. 386; *In re Benton*, 92 Iowa 202, 60 N. W. 614, 54 Am. St. Rep. 546; *Fidelity Trust Co. v. Davis Trust Co.*, 74 W. Va. 763, 83 S. E. 59; *Swayzee v. Miller*, 56 Ky. (17 B. Mon.) 564.

The defendants contend that in no event are they liable for interest. The certificates in question were drawn to the order of John Rohan, executor, and were endorsed "No interest after maturity." It is admitted that demand was made by Craig as domiciliary conservator for the estate funds in the hands of the bank and Dewey, and that such demand was refused. Interest is now claimed as damages by reason of the wrongful refusal by the defendants to pay over the money due the estate.

The question of damages for wrongful refusal to pay money due has never been directly passed upon in this state. In *Brown et al. v. Steck*, 2 Colo. 70, however, the principle of allowing interest as damages is there recognized and approved. At page 77 the court in that opinion said:

"There is unquestionably a technical difficulty in enforcing a contract for the payment of interest after the same contract has been broken by the non-payment of the principal sum, but this difficulty may be overcome by regarding the interest agreed upon, as damages which the law will award, as compensation to the injured party."

The reason for and propriety of this rule is discussed in *Hubbard v. Callahan*, 42 Conn. 524, at page 530, 19 Am. Rep. 564, as follows:

"This rule allowing interest as damages originated in the desire of the courts to adhere to certain technical rules, and at the same time do justice to the parties. Interest could only be allowed on the ground of an express or implied contract to pay it. In case, therefore, of an express written contract covering the subject-matter, but which was silent as to interest, the express contract could not be enlarged by adding a promise to pay interest, and there was no ground or right to imply such a promise. But as it was extremely unjust to have the defendant have the use of the money loaned without compensation, interest was allowed, in the nature of damages, for the detention of the money."

In 22 Cyc. 1495, the doctrine as approved in some twenty-five state jurisdictions, and in the Supreme Court of the United States, as well as in England and Canada, is stated as follows:

"Although in some cases of breach of contract to pay money interest has been allowed on the ground of an implied contract to pay interest that arises from a failure to pay the principal, the general rule established by the great weight of authority is that where there is a contract, express or implied, to pay money, even though such contract be silent as to interest, interest will be allowed upon its breach as damages, and not because of any promise to pay it."

In this case Dewey, as cashier of the bank, was wrongfully withholding the payment of money due an estate of which he was ancillary conservator. Plainly it was to the advantage and profit of the defendant bank, and to Dewey, as a stockholder therein, to retain possession of the funds as long as possible. It was equally advantageous to the estate to have control of the money for reinvestment or for the care of the incompetent. Solely by reason of the wrongful conduct of Dewey and his co-defendant, the bank enjoyed a substantial income which should have gone to the estate of the incompetent. In equity and good conscience both the bank and Dewey should be required to make proper restitution as damages for their wrongful and unlawful conduct.

The judgment of the trial court is reversed and the cause remanded with directions to enter judgment in favor of A. M. Craig, guardian, and against The Bank of Clear Creek County and Frederick P. Dewey, for \$15,530.81, the amount of the four certificates of deposit, with continuing interest thereon at the rate of eight (8) per cent per annum, from February 6th, 1915, the date of the payment demand, to the date of judgment herein. Also judgment against them for \$621.24, one year's interest on the sum total of said certificates at four per cent per annum according to their

terms. Also judgment against them for the amount of the checking account, \$940.00, with continuing interest thereon at eight per cent a year from February 6th, 1915, the date of demand for payment thereof, until judgment herein. Also judgment against Dewey for all interest collected by him on the \$5,000.00 worth of government bonds belonging to the estate, less \$135.84 by him laid out and expended as shown by the record. Also judgment against him that he forthwith surrender and deliver up to Craig, plaintiff in error, the \$5,000.00 of government bonds, and any other property in his possession, belonging to the estate; and further, a judgment discharging him, Dewey, as ancillary conservator. The costs of the proceedings in the County Court to be taxed jointly against Dewey and the bank.

Judgment reversed and remanded, with directions.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9052.

BARTLE v. BOND ET AL.

CONTRACT—Illegal—Public Policy. A promissory note and a mortgage of lands to secure it, given for the purpose of suppressing a criminal prosecution against the mortgagor, is void as against public policy.

Error to Jefferson District Court, Hon. H. S. Class, Judge. En banc.

Mr. S. J. SACKETT, Mr. C. A. IRWIN, for plaintiff in error.

Messrs. STOKES & SHERMAN, for defendants in error.

Opinion by Mr. Justice Teller.

THE plaintiff in error and his wife were plaintiffs below in a suit to enjoin the foreclosure by defendant in error Bond, as public trustee, of a deed of trust, executed by plaintiff and his wife.

The complaint alleged that the deed of trust and the note which it secured were executed under duress, and without

a consideration. The trial court found against the plaintiff in error on both of these questions, but in favor of his wife. The action, as to her, was accordingly dismissed. We are now asked to reverse the judgment on the ground that, as a matter of law, there was no consideration for the note and deed of trust, and that the undisputed evidence shows that the plaintiff in error, no less than his wife, acted under duress in executing said papers.

The testimony of the plaintiff is undisputed that he was threatened repeatedly with prosecution for embezzlement, unless he paid or secured to defendant, The Denver Transit & Warehouse Company, the sum which it was alleged he had embezzled; and that he was arrested without the issue of a warrant, and kept in jail over night, after which he was taken before a justice of the peace, where bail was given. Plaintiff further testified that he owed the said defendant nothing.

It appears that, after the said arrest, the president of said warehouse company and plaintiff in error met in the office of the company's attorneys, where the note and trust deed were executed. One of the company's attorneys testified that plaintiff in error, at said meeting, objected to giving the security if he was to be prosecuted in the Criminal Court; and that thereupon the papers were deposited with the partner of witness, who gave to plaintiff in error the following document, which was prepared by said attorney for the warehouse company:

"This is to certify that I have received from Fred C. Bartle a note for \$3,000, secured by a mortgage upon land in Jefferson County, Colorado, and I have also received from Maud Galvin a certified check for \$2,000, which note, mortgage and certified check are deposited with me upon the following conditions, viz.:

"That the said Fred C. Bartle is indebted to the Denver Transit & Warehouse Company in the sum of \$5,000 and criminal proceedings have been instituted against him

through the office of the District Attorney and are now under his control.

"Now if the said District Attorney is willing to dismiss the said proceedings, the foregoing note, mortgage and certified check are to be turned over to, and delivered to, the Denver Transit & Warehouse Company, in settlement of, and in full satisfaction of, their claim against the said Bartle; but if the said District Attorney refuses to dismiss said proceedings, then the said note, mortgage and certified check shall be returned to Fred C. Bartle and Maud Galvin.

"Dated at Denver, Colorado, this 16th day of October, A. D. 1913.

(Signed) CHARLES A. STOKES."

Plaintiff in error relies upon this paper, and the evidence of the circumstances under which it was signed, to show that there was no valid consideration for the execution and delivery of the note and deed.

It is clear that said instruments were executed at the demand of the defendant company, and in accordance with an agreement evidenced by said escrow receipt. In determining what was the consideration of such agreement, it is wholly immaterial whether or not the sum claimed by the company was due. An agreement to give security for a debt is a matter quite apart from the transaction in which the debt was incurred.

An agreement to give security may be void, and the debt continue as a legal obligation.

From the escrow agreement it is plain that the dismissal of a criminal prosecution was the condition upon which the papers were to be delivered by Stokes; and the agreement to dismiss was the inducement—the consideration—for their execution and deposit with him.

The agreement was contrary to public policy, and void.

The plaintiff was therefore entitled to have the note and trust deed cancelled, and the court erred in rendering judgment against him.

As the judgment must be reversed for the reasons above given, it is unnecessary to consider the charge of duress.

The judgment is accordingly reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

No. 9057.

FIRST NATIONAL BANK OF MONTROSE *v.* FELTER.

CHATTEL MORTGAGE—*Unplanted Crop.* A chattel mortgage of a crop to be grown from seed not yet planted confers upon the mortgagee an equity, effective only by possession taken before the right of any innocent purchaser or incumbrancer has intervened. The record of such mortgage is not notice thereof.

Error to Fremont District Court, Hon. James L. Cooper, Judge.

En banc.

Mr. EDWARD M. SHERMAN, for plaintiff in error.

Mr. D. W. ROSS, for defendant in error.

Opinion by Mr. Justice Teller.

DEFENDANT in error leased a farm to one Allen, and took a promissory note for the rent, secured by a chattel mortgage on the crops grown or to be grown on the land. He received also from Allen an order on a beet sugar company for the proceeds of the sale of beets to the amount of the rent.

Subsequent to the making of said mortgage the plaintiff in error made a loan to Allen, and took as security therefor a chattel mortgage on some personal property, together with 20 acres of sugar beets and other crops, already planted.

When the beets had been marketed, defendant in error brought suit against the sugar company on the order given him by Allen, pleading also his chattel mortgage, and the company appeared, deposited with the clerk the amount due

for beets, and the plaintiff in error was substituted as defendant.

It answered, setting up its debt and a chattel mortgage to secure it, and alleged that the beet crop claimed to be covered by plaintiff's chattel mortgage was not in existence, and had not been planted when said mortgage was executed and recorded, and hence the crop grown was not subject to the lien of the alleged mortgage. It also alleged that it had no knowledge of plaintiff's mortgage. To this the plaintiff demurred, alleging that it was immaterial whether or not the crop had been planted before the giving of the mortgage.

The court sustained the demurrer, the defendant elected to stand on the answer, and has brought the cause here for review.

The only question to be considered is the effect of a mortgage on crops not yet planted, as against a mortgage given after the crop has been planted.

Upon the subject of mortgages on unplanted crops, there has been much discussion, mortgages on crops not yet planted being, in some cases, sustained on the ground that such crops have a potential existence. The weight of authority, however, attributes potential existence only to crops which will develop and come to maturity without the labor of the husbandman, such as hay, and the fruits of trees and vines—the class of products known as *fructus naturales*; while crops to be grown from seed yet to be planted, and which will have no existence but for labor yet to be applied—known as *fructus industriales*—are not the subject of mortgage.

The cases which sustain mortgages on crops to be planted are based on an opinion by Lord Hobart in *Grantham v. Hawley*, Hob. 132, in which it is said of the owner of land, that though he had not the crop "actually in view, nor certain, yet he had it potentially." This statement, as applied to unplanted crops, has been criticised in several cases, and we think with good ground.

To hold that a crop like wheat, corn or beets, whose production depends not only on the labor, but on the will of the mortgagor, has potential existence is to misuse that term. In the case of perennial crops or fruits, the harvest comes in the order of nature, depending neither on the will nor the labor of man. In those cases, there is that which by growth under natural laws comes to fruition. There is something in which the potentiality may properly be said to reside. In the other case, there is only a possibility, or perhaps the probability that something may be brought into being. So long as the planting of the crop is as uncertain as is any other act which is the subject of contract, there is nothing existing which can be said to contain potentialities. In *Cole v. Kerr*, 19 Neb. 553, 26 N. W. 598, the court declined to accept Lord Hobart's *dictum*, and said:

"Soil alone does not produce crops of corn in this degenerate age, if it ever did. It now requires, in addition to soil, seed and labor, both of man and beast."

In *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. 635, the validity of a mortgage on crops not planted was under consideration. The court said:

"There is no good reason for doubting that that which has a potential, or possible existence, like the spontaneous product of the earth, or the increase of that which is in existence, may properly be the subject of sale, or of mortgage. The right to it, when it comes into existence, is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth can not be said to have either an actual or a potential existence before a planting."

The court there further suggested that, the registry of a chattel mortgage being a substitute for an immediate delivery or change of possession, such provision excludes the idea of a chattel mortgage upon nonexistent things. The validity of such mortgages is denied also in *M. & M. S. Bank v. Lovejoy*, 84 Wis. 601, 55 N. W. 108, and in *Hutchinson v. Ford*, 9 Bush. 318, 15 Am. Rep. 711. Cases in Maine,

Georgia, Alabama, Texas, Illinois and Arkansas are to the same effect. In seven states of the Union there are statutes making express provision for the mortgaging of unplanted crops. In *Bernard v. Eaton*, 2 Cush. 303, the eminent Chief Justice Shaw said:

"A mortgage is an executed contract—a present transfer of title thereof, conditional and defeasible; it can, therefore, only bind property existing and capable of being identified *at the time it was made.*"

While the general rule in England and in most of the states of this country is that an instrument purporting to mortgage crops not planted is invalid at law until some new act has been performed by the mortgagor affirming it, or the mortgagee has taken possession when the crops have been grown, such instruments are held in equity to be enforceable when the crop has come into being.

In *Moody v. Wright*, 13 Metc. 17, 46 Am. Dec. 706, the court, considering an agreement that future acquired property should be held as security for a present engagement, declared that it was an executory agreement under which a creditor might take the property into his possession when it comes into existence, and hold it as security. The court said:

"If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage or to subsequently acquired property, an attachment or assignment takes place, the opportunity for completing the lien is lost."

In *Congreve v. Evetts*, 10 Exch. 298, crops were assigned as security for rent, with power to take possession at any time. A creditor seized crops not sown when security was given. In an opinion by Baron Parke it is said:

"If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution; it gave no legal or even equitable title to any specific goods, but when executed to the extent of taking possession of the growing crops, it is the same, in

our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops."

This same rule has been applied to so-called mortgages upon unplanted crops.

It is not contended here that defendant in error took possession under his mortgage. The case was not tried on that theory, nor is it discussed in the briefs.

This designation of the mortgage as a continuing executory contract has been accepted in many cases, and it is now well established that such an instrument is good in equity as against the mortgagor and all persons with notice, so that a mortgagee may take the crop when grown, provided no rights of innocent purchasers or incumbrancers have intervened. This makes it necessary to consider whether or not the filing of such an instrument is notice.

In Corpus Juris, Vol. 11, p. 435, in a discussion of such mortgages, it is said:

"Actual knowledge is required, however, and the constructive knowledge furnished by recording the mortgage is insufficient against a *bona fide* purchaser."

Cases from several states are cited to support the text. On the other hand, in a note on p. 400, 5 Am. & Eng. Ann. Cases, it is said that a filing of such instruments gives constructive notice. Examination of the cases cited to that point discloses the fact that several of them involve leases in which title to the crops were reserved by the landlord. These cases do not apply to the question in hand, since the courts generally make a distinction between the mortgages on unplanted crops, and a reservation of title thereto by a landlord in a lease. *Andrew v. Newcomb*, 32 N. Y. 417. Several others of the cited cases were decided on statutes giving the landlord a lien on the crops, and others on statutes which authorize mortgages on crops to be planted. In two of the cases cited on this point, there was actual notice and in two others the mortgage was on growing crops, and hence not in point. Decisions in Iowa and Idaho support the text.

On principle it must be held that such an instrument, though filed, does not give notice.

In *Butt v. Ellett*, 19 Wal. 544, 22 L. Ed. 183, the court said:

"The mortgage clause in a contract of lease * * * could not operate as a mortgage because the crops to which it relates were not then in existence. When they grew, the lien attached and bound them effectually."

It must be held, therefore, that the filing of the plaintiff's mortgage on crops not planted gave no notice to the defendant, and its mortgage executed and filed after the crop was planted gave it a lien upon said crop. There is in this case no question between the defendant's mortgage, which is good in law, and the plaintiff's mortgage, which could be made effective only by taking possession of the crop after it is grown. No attempt was made to apply the equitable rule by such a taking of possession.

The want of notice, being alleged in the answer, is admitted by the demurrer, but, if upon a trial of the cause it should appear that the defendant had actual notice, a different question would be presented.

The judgment is reversed.

Judgment reversed.

No. 9080.

ANTERO AND LOST PARK RESERVOIR COMPANY v. COUNTY COMMISSIONERS OF PARK COUNTY.

TAXATION—*Dam of Reservoir.* The dam of a reservoir collecting and storing water for irrigation is not taxable.

A judgment approving the assessment thereof as in fact of unsold water rights, not sustained by the evidence, but based on mere conjecture, reversed.

Error to Park District Court, Hon. James L. Cooper, Judge.

Messrs. OWEN & CLARK, for plaintiff in error.

Mr. M. I. O'MAILIA, Messrs. HARTENSTEIN & MCGINNIS, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court.

April 1, 1910, plaintiff in error, as owner of the Antero reservoir, situated in Park County, Colorado, made out and returned to the County Assessor, as the law requires, its tax schedule of what purported to be its taxable property located in that county. This schedule contained the land covered by the dam and reservoir site, but omitted to list the reservoir dam constructed by the company upon the land, the owner claiming it was not assessable. The assessor claimed the dam was assessable and taxable as an improvement upon the land, and July 7th wrote the company that he intended to list the dam for taxation, and requested it to kindly furnish him with the amount they had expended on the reservoir dam up to the first day of April, 1910, as a basis for taxing the dam.

July 16th the company replied that it had expended on account of the construction of the Antero dam the sum of \$128,751.41 up to April 1, 1910, but denied that the dam was assessable or taxable, and denied the right of the assessor to make such an assessment on the dam.

Notwithstanding this, upon receipt of the letter, the assessor increased or added to the owner's tax schedule of taxable property, the Antero reservoir dam, under the classification of "improvements," which he claimed the owner had omitted from the schedule, and which he assessed at \$42,900.00 for the purpose of taxation, being one-third the cost of construction, and notified the company of this additional assessment.

August 17th the company filed with the assessor its written objections to this assessment upon the ground that the Antero reservoir dam was assessed by the assessor at \$42,900.00 as an improvement upon the land upon which it stood, was not subject to separate assessment and was not an improvement upon the land comprising the dam site, within the meaning of the word "improvements" as used in the revenue laws of Colorado, and was not taxable, and

for the forther reason that the owners of the reservoir water rights were also owners of land upon which the water was applied, which rights were taxable and taxed as improvements upon the land upon which the water was used, and that the water rights were not subject to separate or double taxation.

August 27th, the assessor answered in writing, in overruling these objections, that he assessed for taxation the reservoir dam as such as an improvement upon the land at the valuation of \$42,900.00 upon the basis of one-third of the amount expended by the company in the construction of the dam up to April 1, 1910, as obtained from figures furnished him by the company at his request; that in the tax schedule made by him he used the word "improvements" in accordance with the definition of that term in Section 13, S. L. 1902, p. 45, and understood that the company's only objection to the tax was to the assessment of the reservoir dam, and that he assessed the dam for taxation upon a duplication value of its cost.

The tax being unpaid, September 29, 1911, the county treasurer notified the company that its 1910 tax, with interest, amounted to \$1,066.85, and that he would advertise October 20th, and afterwards did advertise that the reservoir would be sold for taxes on November 20th.

The complaint alleges that a tax sale would have harassed and embarrassed the company in the discharge of its obligations and cast a cloud upon its property, and injure its credit and financial standing, to avoid which it paid the tax under protest.

December 18, 1911 it began this action under section 202, S. L. 1902, p. 146, to recover from the county the tax on the dam paid under protest.

The assessor testified on the trial that he assessed all property in the county that year at one-third its cash value, because the county assessors and the state board agreed to that course; that he assessed plaintiff in error's property upon what he called a physical valuation; that is, he as-

sessed the lands of the company, including the site of the dam and reservoir, the same as adjacent lands belonging to other taxpayers (which tax is not in dispute); that before assessing the dam he interrogated the company as to the cost of construction of the dam up to April 1, 1910, and obtained from them the amount expended upon the dam up to that date, and then assessed the dam at one-third of this amount, classifying it on the schedule as "improvements" upon the land upon which the dam was erected; that the company denied his right to assess the reservoir dam, and filed with him a written protest against such assessment and tax; that the amount of assessment exceeding \$7,500.00 he answered in writing, denying the objections.

Paul M. Clark, an attorney for the company, testified that water rights in the reservoir had been sold for the irrigation of 11,000 acres of land lying under the high line canal, and that the remainder of the rights in the reservoir were under contract of sale to the East Denver Irrigation district for use in Adams County. There was no other evidence as to there being remaining or unsold rights in the reservoir, their number, or value.

The court found that the company was organized for the purpose of selling water rights; that there still remained in the reservoir, at the time of the assessment, unsold water rights belonging to the company; that it owned no land upon which to apply them, but held them for sale; that the dam as such of itself was valueless, and not an improvement upon the land; that the essential asset held by the company was its remaining water rights in the reservoir; that the cost of construction of the dam in no way indicated the value of the remaining water rights owned by the company in the reservoir; but that the assessor intended to assess these remaining water rights, and simply measured their value for the purposes of taxation by the cost of construction of the dam; that the cost of constructing the dam may be, or equal, the true valuation for taxation of

such remaining water rights in the reservoir, and that the evidence failed to show that such valuation if applied to the water rights is unjust or erroneous. The court was, therefore, of the opinion that the reservoir company still had water rights remaining in its reservoir, subject to taxation somewhere, and that it was such rights, and not the dam, that the assessor intended to list for taxation, and held that, because the company failed to show that the tax was unjust, particularly in view of the fact that the court could not direct a new assessment of the water rights, and the company would escape taxation on them if the levy was set aside, the tax on the dam would not be disturbed, and entered judgment accordingly, and plaintiff brings the case here for review on error.

1. The reservoir rights used upon land lying under the high line canal were, under our statute, taxable as real estate like improvements in connection with and upon the land on which they were applied, and were not subject to double taxation. There may have remained water rights in the reservoir subject to taxation in Park County, as to that we express no opinion because it is not involved in the case. We are dealing with the legality of listing for taxation and compelling the company to pay a tax on the dam as such. The dam was not subject to separate taxation. It was not an improvement upon the land within the meaning of our Revenue Laws.

Kendrick v. Twin Lakes Res. Co., 58 Colo. 281; *Shaw v. Bond*, Colo. —, 171 Pac. 1142.

2. The court found water rights remaining in the reservoir were subject to taxation in Park County, and that the assessor in fact intended to assess such remaining rights, taking the cost of constructing the dam as the measure of their value for taxation, or using this as a means in arriving at their value. One trouble with the theory is it is not supported by a particle of evidence. The evidence shows that the assessor not only intended, but in fact assessed the dam as such, and not remaining rights in the reservoir.

This theory was an afterthought evolved by the court, and not by the assessor. The only contention between the assessor and the owner was over the taxation of the dam, and the matter of treating the assessment and value placed upon the dam as the assessment and tax on the remaining water rights appears for the first time in the findings of the trial court.

3. The evidence shows the assessor intended to assess, and in fact did assess the dam, and the only question before the court was to determine whether such assessment was valid. The court conceded that the dam as such was not taxable, and that the water rights used on land in the lower counties were not taxable in Park County, but evolved a theory that the valuation in the schedule placed upon the dam by the assessor may have equalled the valuation of remaining water rights in the reservoir, and inasmuch as plaintiff did not show the contrary, or that the valuation placed on the dam exceeded the valuation of the remaining water rights, the tax on the dam would not be interfered with, notwithstanding the dam as such was not taxable, otherwise the company would escape taxation on water rights it still owned in the reservoir.

4. The course pursued by the court has the merit of being summary, but it is not the law. It is both unjust and erroneous. The statute provides that in all cases where any person shall pay any tax that shall thereafter be found by a court to be illegal or erroneous, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the Board of County Commissioners shall refund the same without abatement.

The company was obliged on account of this illegal assessment to pay and did pay under protest, an erroneous tax upon the dam. In such a case the statute provides that the county shall refund the tax.

Judgment reversed and cause remanded.

Chief Justice Hill and Mr. Justice Scott concur.

No. 9088.

DRENNEN v. JOHNSON.

1. COUNTY COURT—*Appeal to District Court—Docketing.* If the clerk of the District Court upon receiving the transcript and files in a cause appealed from the County Court gives to the cause a number, entering it upon the Register of Actions, the appeal is docketed, though no docket fee is paid.
A rule of the District Court requiring, at the initiation of every civil cause payment of a specified sum, to be applied to the costs, is without effect upon the question.
3. RULES OF COURT—*Effect.* A rule of court cannot destroy a right nor impose burdens upon its exercise.

Error to the Morgan District Court, Hon. H. P. Burke, Judge.

Mr. ARCHIBALD A. LEE, Mr. F. E. PENDELL, for plaintiff in error.

Messrs. STEPHENSON & STEPHENSON, Mr. ARLINGTON TAYLOR, Mr. C. E. ROBISON, for defendant in error.

Opinion by Mr. Justice Allen.

This is an action originally instituted in the County Court of Morgan County by L. G. Johnson, hereinafter called the plaintiff, against Ralph R. Drennen, hereinafter referred to as the defendant. The case was decided in favor of the plaintiff, in the County Court, and the defendant thereafter, and within the time allowed by law filed an appeal bond in that court. The bond being approved, and all costs having been paid as prescribed by law, the County Court on August 28, 1916, lodged the case with the Clerk of the District Court, delivering to the clerk all of the papers pertaining to the case.

On September 28, 1916, the plaintiff filed a motion in the District Court, "to remit and remand the transcript and all the files" in the case to the County Court where the action was originally tried. The motion was granted. The defendant brings the cause here for review, assigning as

error the action of the District Court in sustaining the motion to remand the case to the County Court.

The motion to remand was predicated upon plaintiff's interpretation of the following clause in section 1538 R. S. 1908, sec. 1662 Mills Ann. Sts. 1912:

"* * * and in case the appeal is not docketed by the appellant in the district court within thirty days after being lodged with the clerk of the district court, the transcript shall be remitted by the clerk of the district court to the county court; and the county court shall proceed on said judgment as though no appeal had been taken."

The motion was framed on the theory that the cause was "not docketed by the appellant," within the meaning of the statute, because "no docket fees were paid by defendant within thirty days after the lodging of the transcript in the office of the clerk of the District Court."

It is conceded that the cause was physically docketed on the same day that the papers were received by the clerk of the District Court. The clerk on that date, August 28, 1916, entered in the Register of Actions, a book kept for that purpose, the title of the case together with the notation that it was a "Money Demand" and an "Appeal from County Court." The cause was numbered 3068 in the Register of Actions. The number so given to the cause was the next consecutive number immediately following all previously docketed causes in the District Court.

No docket fee was paid at any time within thirty days after the papers were delivered to the clerk of the District Court. The plaintiff contends that because of this fact, and notwithstanding the circumstance that the clerk actually docketed the case, the case was not "docketed by appellant," within the meaning of the appeal statute hereinbefore quoted.

Aside from a rule of court, hereinafter noted, this contention appears to be made in reliance upon certain expressions found in *Tierney v. Campbell*, 7 Colo. App. 299, 233, 44 Pac. 948, and *Thomas v. Beattie*, 42 Colo. 236, 93 Pac.

1093. In the latter case the court, among other things, said:

"The purpose of the statute was to prevent unnecessary delay by requiring the appellant to promptly docket his appeal in the district court by paying the fee required for that purpose."

In neither of the two cases just cited did the facts show the actual docketing of the case by the clerk. Both of these cases are referred to and discussed in *Wigton v. Wigton*, — Colo. —, 169 Pac. 133, and shown not to be decisive of a case where, as here, the clerk docketed the case.

In the *Wigton* case this court regarded a cause as docketed by the appellant in the District Court where the clerk entered the case upon the docket without first collecting the docket fee. Docketing the case and paying the docket fee are two distinct acts. The statute relied on by plaintiff, to uphold the judgment of the trial court, expressly refers to the act of having the case docketed by the appellant" but makes no mention of the payment of the docket fee. Doubtless under section 2528 R. S. 1908, which provides that clerks of courts may require a deposit in advance on account of fees, the clerk of the District Court could have refused to docket the case until the docket fee was paid, but having actually docketed the case without first obtaining the docket fee the result is the same, so far as the appellee in the District Court is concerned, as if the docket fee had been paid; and the cause cannot be remanded simply on the ground that the fee had not been paid. Why the clerk, in any particular case, chooses to docket the cause without collecting the docket fee in advance, is not material. The opinion in the *Wigton* case approvingly quotes the following from *People v. Quinn*, 12 Colo. 473, 21 Pac. 488:

"The statutes make further provision for the protection of court and other officers by permitting them to collect their legal fees in advance; and if the right is not insisted upon at the proper time, the officer must be understood to

have waived it, and to have consented that such fee shall abide the result of the suit."

So far as the statutes are concerned, in the case at bar the cause was docketed and the appeal perfected. *Wigton v. Wigton, supra*.

The plaintiff calls our attention to a rule of the District Court of Morgan County providing that "Whenever any civil action shall be brought in this court the plaintiff shall deposit with the clerk \$5.00 to be applied to the payment of costs," etc. This rule of court is practically the same, in purpose and effect, as the statute (section 2528 R. S. 1908) which provides that clerk may require a deposit of five dollars in advance, etc. In the *Wigton* case this statute was regarded as permissive. If the rule of court above mentioned is mandatory, that fact does not change the result, for the reason that the right of appeal from the County Court to the District Court is a statutory right, the statute provides the manner in which such appeals may be perfected, and, as said in *People v. Quinn, supra*, "no rule of court can deprive a party of this right, or impose additional burdens as conditions precedent to its exercise." If, as is the result of the decision in the *Wigton* case, an appeal may, so far as the statutes alone are concerned, be perfected without paying the docket fee, provided the clerk actually docketed the case within the prescribed time, a rule of court cannot be so enforced or construed as to nullify the clerk's docketing of the case, simply because the clerk acted without collecting the docket fee. The rule of court herein referred to had for its purpose the protection of the clerk against personal liability for the docket fee provided by statute, and if the clerk should see fit to docket the case without collecting the fee in advance, and waive the right to collect the same in advance or charge the same to the appellant or his attorney, such conduct on the part of the clerk would not affect the right of the appellant to have the case deemed docketed within the meaning of the statute.

The cause having been docketed in manner as provided by

law, it was error for the trial court to order the transcript remitted to the County Court simply because of the fact that the clerk had not collected the docket fee within the thirty days allowed by statute for docketing the case. The judgment is reversed and the cause remanded to the District Court for further proceedings in harmony with the views herein expressed.

Reversed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9112.

HENRYLYN IRRIGATION DISTRICT v. PATTERSON.

IRRIGATION DISTRICT—*Right to Purchase Land at Tax Sale.* Lands sold to the county for taxes are excepted from the provisions of c. 109 of the Acts of 1915. Such lands are not to be sold at all for taxes until by redemption or sale the county is made whole.

Error to Weld District Court, Hon. Neil F. Graham, Judge. Department.

Mr. JOHN R. SMITH, Mr. H. B. WOODS, for plaintiff in error.

Mr. WALTER E. BLISS, for defendant in error.

Opinion by Mr. Justice Teller.

The plaintiff in error sought by mandamus to compel the defendant in error, as County Treasurer, to strike off to it lands alleged to be subject to sale for delinquent taxes where no bids were made for the same, relying on the provisions of chapter 109 of Laws of 1915 to support its demand. That statute makes it the duty of the County Treasurer, at a tax sale, to strike off to an irrigation district, lands in the district offered, and for which no bids are received. The writ recites that the defendant in error excuses his non-compliance with such statute by the fact that the lands which he did not strike off to the district had, at former sales, been struck off to the county, and that it still held certificates thereon.

The only question presented is as to the duty of the County Treasurer, in the circumstances stated, under section 5713, R. S. 1908, which provides generally for the sale of lands on which taxes are delinquent, and closes with the following:

"No taxes assessed against any lands purchased by the county under the provisions of this action shall be payable until the same shall have been derived by the county from the sale or redemption of such lands."

The statute of 1915 above cited contains a similar provision making taxes assessed on lands struck off to the district payable only from funds derived from a sale or redemption of such lands.

The defendant in error cites the case of *Emerson v. Valdez*, 24 Colo. App. 462, 135 Pac. 137, as decisive of this question. It was there held that, when there was an outstanding tax sale certificate in the hands of a county, no taxes on the land covered by the certificate could be due and payable at the time of a subsequent tax sale.

It is therefore contended that, as to the lands in the district on which the county held tax certificates, the statute of 1915 does not apply, since such lands were not subject to tax sale.

Every tax sale, regular in all respects, is the beginning of a new title, which is paramount to titles originating in former sales; *Morris v. Graubeger*, 59 Colo. 164, 147 Pac. 674. If, then, the land, on which the county holds certificates, be again sold for taxes, and be bought in, the county loses all interest in the property, and the taxes for which it received the certificate need never be paid. We think the construction given to the statute by the Court of Appeals is correct. It follows that the district has no right to have struck off to it lands on which the county holds certificates issued on sales prior to 1915.

The judgment is therefore affirmed.

Judgment Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9101.

KENDALL v. METROZ.

1. **STATUTE OF FRAUDS—Pleading.** It was contended that a parol gift of an interest in lands was void by the Statute of Frauds. The statute not having been pleaded, the question was not considered.
2. — *Parol Gift of Lands*, will be enforced in equity only where, in reliance thereon, valuable improvements have been made.
3. **APPEAL AND ERROR—Party Bound by Position Below.** A party will not be heard to complain of the exclusion of evidence which was rejected upon his own objection thereto.

Error to Gunnison District Court, Hon. Thomas J. Black, Judge.

En banc.

Messrs. MORRISEY, MAHONEY & SCOFIELD, Mr. JOSEPH J. WALSH, for plaintiff in error.

Mr. J. M. MCDOUGAL, Messrs. SAPP & NASH, for defendant in error.

Opinion by Mr. Justice Teller.

Plaintiff in error brought suit against defendant in error for an accounting, and a recovery of a share of the proceeds of a sale of a ranch bought by the parties on partnership account, and sold by defendant who held title.

The answer admitted the purchase, on partnership account, and the sale, and set up in defense that the plaintiff abandoned the enterprise, left the ranch, saying that he would have nothing more to do with it, and that defendant could have the property to do with as he pleased.

Plaintiff by replication denied that he had given the property to defendant.

The action was begun some eight months after plaintiff left the ranch, and about three months after its sale by defendant.

The court found that there was a valid gift of the interest in the land by parol, and dismissed the action.

For plaintiff in error it is urged that the plaintiff's interest was an interest in land; that it was not subject to gift by parol, because of the statute of frauds; and, further, that the gift is not valid because there was no evidence of possession followed by valuable improvements made in reliance on the gift.

The statute of frauds was not plead, nor was the question of the statute raised on the trial; hence, it need not be considered.

It is undoubtedly true that a parol gift of an interest in real property is good in equity, as a rule, only when valuable improvements have been made in reliance on the gift, so that to refuse to enforce it is inequitable.

Counsel are correct in stating that there is no evidence of improvements in this case; but can they base an objection to the judgment on that fact, since the record shows that on two occasions defendant's counsel asked witnesses what improvements had been made on the ranch after plaintiff's departure, and, in each case, on the objection of plaintiff's counsel, the testimony was excluded? To permit them to reverse the case for lack of evidence which was excluded by their action, is to give them the advantage of error for which they are responsible.

They are not permitted to change the theory on which they tried the case, and now ground a plea for reversal on the want of evidence of improvements, which, but for their objection, might have been introduced. They insisted on the trial that the only issue was as to the making of a gift, and the question of a consideration therefor, though a gift contradicts the idea of a consideration.

They made no point of the necessity that the making of improvements be shown, but by their objections denied the pertinency of such evidence.

Parties cannot thus shift their position.

In *Stratton C. C. M. Co. v. Ellison*, 42 Colo. 498, 94 Pac. 303, this court said:

"Upon appeal it is too late to introduce a new theory differing radically from that on which the court and both parties proceeded at the trial below."

In *Lebcher v. Lambert*, 23 Utah 1, 63 Pac. 628, the court in reviewing a record presenting the very point now under consideration held that counsel, having by objections excluded evidence that later, on appeal, they asserted to be necessary, must stand by their original theory, and could have no advantage of the new theory.

This rule is well settled and just. 3 C. J. 718.

Plaintiff in error being thus unable to press the only substantial error assigned, the judgment must be affirmed.

Judgment affirmed.

Mr. Justice White dissenting.

Mr. Justice White Dissenting:

If the affirmance of the judgment of the trial court may not be based upon other grounds than those set forth in the opinion of this court, I cannot concur therein.

The answer admitted the ownership of the land to be in plaintiff and defendant, and alleged a gift by plaintiff of his interest therein to the defendant. The replication denied the alleged gift. The question for determination was whether or not the plaintiff had made a gift of his interest in the land to defendant, and it devolved upon the latter to come forward with his proof in that regard. If the plaintiff's interest in the land was not subject to gift by parol because of the statute of frauds, then defendant, showing only a gift by parol, had failed in his proof, and the finding and judgment of the trial court are in no wise supported by the evidence.

Furthermore, I cannot agree to the holding that because the record shows that defendant's counsel asked a witness what improvements had been made on the ranch after plaintiff's departure therefrom, and, upon objection by plaintiff's,

counsel, the witness was not permitted to answer, that plaintiff is thereby precluded from claiming in this court that the evidence in the record does not establish a gift of his interest in the land. If a parol gift of an interest in real property is good in equity *only* when valuable improvements have been made in reliance on the gift, then it is essential, if a pleader proposes to rely upon a parol gift of such property, to allege, not only the making of the gift, but also the making of valuable improvements in reliance on such gift.

In the case at bar, defendant's pleadings contain no allegation that he made improvements upon the land subsequent to the alleged gift, or at all. In the absence of such pleading the proof he offered was inadmissible, and was properly excluded from the record upon the objection of plaintiff.

No. 9118.

GREGG v. THE PEOPLE.

1. CONSTITUTIONAL LAW—*Due Process of Law*. Statutes creating presumptions, shifting the burden of proof, or declaring what shall be *prima facie* evidence, are within the legislative competency. A statute declaring that general reputation shall be evidence of the character of the house as a house of ill fame is not an interference with the property right of the proprietors, without due process of law.
2. CRIMINAL LAW—*Bawdy House—Injunction*. Under c. 123 of the Acts of 1915 the owner of premises may be enjoined from permitting the use thereof as a brothel.
That the owner had nothing to do with the keeping of the house is immaterial. The purpose of the statute is to abate the nuisance by stripping it of its furniture, fixtures and equipment.
The owner may if he can establish his innocence.
3. — *Parties*. The owner of the premises as well as keeper of the brothel, may be made defendant. The owner cannot complain if the tenant is not made party.
4. — *Equity Jurisdiction*. The statute provides a civil action in aid of criminal process. The power of the legislature to so extend the jurisdiction of equity is well established. The defendant is not entitled to a trial by jury.

5. — *Evidence.* The owner of the premises lived adjacent thereto, and collected rent from the keeper of the brothel. Held sufficient to establish his guilty knowledge and compliance.

*Error to Las Animas District Court, Hon. A. Watson
McHendrie, Judge.*

Mr. EARL COOLEY, Mr. GEORGE BLICKHAHN, Mr. JOHN BETTS, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General; Mr. BERT-
RAM B. BESHOR, Assistant Attorney General, for The Peo-
ple.

Mr. Justice Garrigues delivered the opinion of the court.

Chapter 123, S. L. 1915, page 360, under which this ac-
tion is brought, may be summarized as follows:

Sec. 2. The building, the ground upon which it is sit-
uated, together with the furniture, fixtures, musical instru-
ments and contents, when used or resorted to as a public or
private place of lewdness, assignation or prostitution, is
deemed a nuisance, and may be restrained and prohibited in
equity by injunction.

Sec. 3. Whenever there is reason to believe that such
a house or place is kept or exists, the District Attorney
must, in the name of the People, and any citizen may,
maintain an action in equity to perpetually enjoin the keep-
er from maintaining the same, and the owner of the build-
ing from permitting such nuisance to be kept on his place,
and to abate and prevent the nuisance.

Sec. 4. Whenever, in such an action, either by verified
complaint or affidavit, the keeping of such a house is shown
to the satisfaction of the court or judge, he shall allow a
temporary writ of injunction to prevent its continuance or
recurrence and to abate the nuisance.

Sec. 5. On the trial of the case evidence of the general
reputation of the place, and of its habitues, is admissible for
the purpose of proving the existence of the nuisance.

Sec. 6. Any violation or disobedience of any injunction or order provided for by the act is punishable as a contempt of court.

Sec. 7. If, on the trial, the existence of such a house or place is established by the evidence as provided by the act, the court must enter an order abating the nuisance directing the removal from the place or building, and sale as under execution, of all fixtures, furniture, musical instruments and movable property, used in keeping the place; also directing the effectual closing of the building or place against its future use for any purpose, and keeping it closed for one year, unless sooner released in the manner provided by the act, and while the closing order remains in effect, the building or place shall remain in the custody of the court.

Sec. 8. Section 8 provides how the proceeds from the sale shall be applied.

Sec. 9. Section 9 provides if the owner of the building or place has not been guilty of contempt of court in the proceedings, and appears and pays all costs, fees and allowances (and these are made a lien on the building or place), and files a bond in the full value of the property, to be ascertained by the court, with sureties to be approved by the court or judge, conditioned that he will immediately abate any such nuisance existing at such building or place, and prevent such a house from being established or kept thereat, within a period of one year thereafter, the court or judge may, if satisfied of his good faith, order the closed premises to be redelivered to the owner, and the order cancelled so far as it relates to the owner of the building, but the release of the building shall not release it from any judgment, lien, penalty or liability to which it may be subject by law.

Sec. 10. The act provides that any fine in the proceedings against the owner of the building for contempt of court, and the costs, fees, and allowances, shall be a lien upon the building or place, which may be enforced by special execution.

The complaint alleges that defendant below, James Gregg, is the owner of a building or place, describing it, used and resorted to as a public and private place of lewdness, assignation and prostitution, that such a place is kept and exists and that defendant is the keeper of the place. The complaint prays for a temporary writ of injunction, to be made perpetual on final hearing, to restrain the keeping of such a house, and for the abatement of the nuisance.

A temporary injunction was issued restraining defendant from keeping or permitting to be kept such a house or place in his building, which, on final hearing, was made perpetual.

Defendant was served with notice, and on the day set for hearing the case was tried to the court without a jury. Defendant appeared without counsel, and the court, after hearing the evidence, found that such a place or house was kept and existed as described in the complaint, and that defendant was the owner and keeper of the place or house, and was also the owner of the ground or building at which the place was kept, and entered a decretal order that the fixtures, furniture, musical instruments and movable property used in conducting and keeping the place be removed and sold under execution, and that the building be closed against its use for any purpose, and kept closed for one year unless sooner released as provided by law, and, until released, that it remain in the custody of the court; and taxed the costs against the defendant.

J. E. Kane, acting sheriff of the county for one and one-half years, testified in substance:

"The place has been used as a bawdy house, it has the general reputation of being a bawdy house—a sporting house. Gregg owns the place. Have had frequent complaints from that vicinity about the house.

J. W. Coe, deputy sheriff of the county, testified in substance:

"Was out to the place on the 3rd of July, J. M. Johns, a colored man, was in charge of the place. Saw quite a num-

ber of men and one woman in the building. Johns said his girls had all gone but one, and he hadn't had time to get out and get any more. The place has the general reputation of being a bawdy house—have heard so a dozen different times or more. Gregg lives in an adjacent building 30 feet away from the main building."

Tobe Dennis, deputy sheriff, testified in substance:

"The place has the general reputation of being a bawdy house, have seen sporting women there at different times. Have had complaints about the place."

The record then shows that after the people rested, Gregg came forward and was sworn as a witness in his own behalf and stated to the court that he was without a lawyer. Whereupon, the court asked him what he had to say about the case, and he said in substance:

"That he owned the house or place, but had had it rented to Johns, a colored man, for about two years, at \$30.00 a month, but that he didn't know what Johns was doing with it, and if it was being run as a bawdy house that he had no knowledge of that fact."

1. The fact that a building is used or resorted to as a public or private place of lewdness, assignation or prostitution embraces the definition of a bawdy house. Therefore, to sustain the judgment, it was necessary for the people to show, to the satisfaction of the court by a preponderance of the evidence, that such a house existed or was kept at the premises; that defendant was the owner of the premises, and that he knowingly permitted the place to be used and occupied for such purposes.

2. It is strenuously insisted that the evidence is not sufficient to support the allegation that the place was a bawdy house.

The reputation of a house is obtained through the character of the inmates and the class of people who resort there. Ordinarily the fact that a house is such a place cannot be proven by its general reputation alone, but may be proven by the character of the inmates and the class of peo-

ple resorting there. But the statute changes this rule of evidence. It provides that evidence of the general reputation of the place, or of its habitués, shall be admissible for the purpose of proving the keeping of such a place on the premises.

3. It is claimed this statute is unconstitutional because it permits interference with plaintiff's property rights without due process of law.

Rules of procedure or of evidence, such as statutes creating certain presumptions, or shifting the burden of proof, or providing that certain facts shall constitute *prima facie* evidence, are under the control of the legislature and do not interfere with property rights without due process of law. It is simply one of the methods of proof prescribed by the legislature to show that such a house exists. Therefore, the contention that the statute in this regard is unconstitutional cannot be sustained.

4. It is insisted that the evidence does not show that defendant maintained, that is, that he kept the house.

By keeping a bawdy house is meant, primarily, governing it, and exercising control and direction over the house, and the conduct of its inmates. There is no evidence that defendant kept this place, or that he leased the premises for such use. Under the statute, however, the owner of premises may be enjoined from permitting their use for such purposes. There is sufficient evidence that he owned and rented the premises to Johns who kept the place, and that defendant permitted it to be kept.

5. If defendant had nothing to do with the keeping of the house further than knowledge that the place was being so used, and collected his rent, this made him interested in the keeping and brought him within the provisions of the statute as one who permitted such a place to be kept on his premises. The purpose of the statute is to abate the nuisance by stripping the house of its furniture and fixtures and selling them at sheriff's sale to pay the costs, closing the house against all purposes for one year, and permanent-

ly enjoining the owner from permitting such future use of his premises.

6. The keeper of the house was not made a party and is not here complaining, and defendant, if he permitted the keeping, cannot complain to that portion of the injunctive order which relates to him as the owner of the premises, nether can he complain if he was the owner of the furniture, nor because Johns was not made a party.

7. The claim is made that the defendant did not permit such use of the premises, and had no knowledge of the unlawful keeping.

While there is nothing in the statute which provides that the want of such knowledge shall immune the owner from injunction, still it is generally held that statutes of this kind operate only against owners having knowledge, that is, knowingly permitting such unlawful use, and it is held to be competent for owners of such premises to prove their innocence.

8. It is also insisted that the statute is penal, therefore defendant was entitled to trial by jury.

Keeping a bawdy house is a statutory offense, and was a crime at common law. If this is a criminal action, defendant was entitled to trial by jury; but it is not a criminal action, it is a civil action in equity by injunction to restrain defendant from permitting the keeping of such a house on his premises, and to abate the nuisance. The equitable action is in aid of the criminal statute. Any one subject to prosecution under the criminal code for keeping a bawdy house, and any one permitting it to exist on his premises is subject to injunction under the civil action. Since the purpose of the statute is not the infliction of punishment against the offender, that being left to the criminal law, but the suppression of the unlawful keeping, the claim that keeping a bawdy house is a criminal offense under the statute makes no difference; therefore, there can be no successful assault upon the statute because it provides a civil action to enjoin the violation of a criminal statute.

The power of the legislature to thus extend the bounds of equity jurisdiction, as well as to prescribe the procedure, is well established.

9. The injunctive features of the statute are broad with no designation of the parties who shall be made defendants. It may, therefore, be assumed that it was intended that the owner of the premises, as well as the keeper of the place, might be made parties.

10. It is claimed that the statute is unconstitutional because it is an unwarranted exercise of the police power.

Similar legislation has been before the courts of last resort in other states, and it has been uniformly held that the legislature has the power to create a civil remedy in equity by injunction and contempt proceedings to prevent such an unlawful future use of premises. In Iowa, under a statute, a permanent injunction was allowed to issue out of a court of chancery against the owner of premises to prevent the unlawful sale of intoxicating liquors thereon, and since then other states have passed similar statutes regarding the keeping or permitting the keeping of bawdy houses, and such statutes have universally been held constitutional, and not an unwarranted exercise of the police power. See: *Martin v. Blattner*, 68 Iowa 286, 25 N. W. 131, 27 N. W. 244; *State v. Fanning*, 96 Neb. 123, 147 N. W. 215; *State v. Fanning*, 97 Neb. 224, 149 N. W. 413; *State v. New England Furniture & Carpet Co.*, 126 Minn. 78, 147 N. W. 951, 52 L. R. A. (N. S.) 932, Ann Cas. 1915D, 549; *State v. Ryder*, 126 Minn. 95, 147 N. W. 953; *State v. Grefig*, 164 Wis. 74, 159 N. W. 560; *People v. Smith*, 275 Ill. 256, 114 N. E. 31, L. R. A. 1917B, 1075; *State v. Humphrey*, 94 Wash. 599, 162 Pac. 983; *Moore v. State*, 107 Tex. 490, 181 S. W. 438.

11. It is claimed the evidence is insufficient to warrant the conclusion that defendant knowingly permitted the keeping of the place on his premises.

The evidence shows that defendant lived in a house adjacent and only thirty feet away from the premises in ques-

tion. Ignoring the rule that an owner is presumed to know the kind of business that is conducted on his premises, it is unreasonable to believe that defendant could reside so near, and collect his monthly rent, without knowing the kind of conduct that was carried on in the place. In *State v. Humphrey*, 94 Wash. 600, defendants testified that they had no knowledge that there had been such conduct on their premises. The court in answer to this said:

"It appeared, however, that they resided at all times in a dwelling house situated within ninety feet of the building, and that it was common knowledge in the neighborhood that it was being so conducted, frequent complaints to that effect being made to the police. It appeared also that the appellant, Jesse J. Humphrey, collected the rents for the building monthly during the time it was occupied by the woman named, going to the house for that purpose."

We think the court was warranted in finding that defendant knew of the unlawful conduct carried on in his premises. There is no evidence that he tried to stop it and was unable to do so, therefore, he permitted it to exist.

Judgment affirmed.

Decision en banc.

No. 9117.

**EMERSON AND BUCKINGHAM BANK & TRUST COMPANY v.
GERMAN AMERICAN TRUST COMPANY.**

PROMISSORY NOTE—Endorser—Notice of Dishonor. Where the parties to commercial paper reside in different places notice of the dishonor must, if by mail, be deposited in the post in time to go out on the day following the dishonor (Rev. Stat. secs. 4567, 4570).

Delay while investigating the apparent erasure of a party's name on the paper not excused.

*Error to Denver District Court, Hon. John A. Perry, Judge.
Department.*

Messrs. PERSHING, TITSWORTH & FREY, Mr. ROBERT G. BOSWORTH, for plaintiff in error.

Messrs. FILLIUS, FILLIUS & WINTERS, for defendant in error.

Opinion by Mr. Justice Teller.

The plaintiff in error seeks to recover from the defendant in error as an indorser on a promissory note held by the former. The trial court found in favor of the defendant and entered judgment accordingly.

The facts, as they appear by stipulation, are that the note fell due on July 7, 1914; that, on July 2, the plaintiff mailed it, at Longmont, Colorado, to the Colorado National Bank, of Denver, to be forwarded to New York, where it was payable, for presentment to the maker. It was received by the Denver bank July 6th, and dispatched at once to New York. It was there presented for payment July 9th, and, payment not being made, it was protested, and notice of dishonor sent to parties who appeared liable as indorsers but not to the defendant. Its indorsement had been apparently removed by a line of ink drawn through it.

Plaintiff, however, on July 13th or 14th, received the note, and notice of its non-payment, but did not give defendant notice of the note's dishonor until July 20th.

The trial court found, among other things which prevented a recovery, that the delay of six or seven days in giving the defendant notice was not excusable, and that due notice of dishonor had not been given to defendant.

The parties residing in different places, the notice must be given as required by Sec. 4567, R. S. 1908. If sent by mail, it must be deposited in the post office in time to go by mail on the day following the dishonor, or the receipt of notice of it, (Sec. 4570, R. S. 1908); or, if given otherwise than by mail, then within the time that it would have been received in due course of mail.

It appears that notice was delayed pending an attempt to ascertain why the defendant's indorsement had been

marked out, but there is no apparent reason why the notice could not have been given while that inquiry was going on.

We agree with the trial court that no excuse for the delay is shown, and hence, on this record, the defendant is not liable on its indorsement. This being so, it is unnecessary to consider the other questions argued in the briefs.

The judgment is affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice White concur.

No. 9121.

CHALUPA, ET AL. v. PRESTON.

1. FRAUDULENT CONVEYANCE—*Relief of Creditor*. A creditor may assail a conveyance made in fraud of creditors, without first recovering judgment upon his demand.
2. — *Evidence—Burden of Proof*. In a transaction between relatives or those connected in marriage, the parties thereto have the burden of establishing its innocence and integrity. The evidence examined and held to establish that the conveyance assailed was without consideration and with fraudulent intent.

Error to Denver District Court, Hon. George W. Allen, Judge.

Mr. GEO. B. CAMPBELL, for plaintiffs in error.

Mr. EWING ROBINSON, Mr. DELPH E. CARPENTER, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

The complaint in this case alleged that the plaintiff Burton Preston, obtained a judgment against the defendant Joseph S. Knotek, on the 8th day of December, 1914, in the sum of \$3,481.00 and costs. That on the 17th day of February, 1915, a transcript of said judgment was filed for record with the County Clerk and Recorder of the city and county of Denver, where the defendant resided. That prior thereto, and on the 14th day of December, 1914, ex-

cution on said judgment was issued, directed to the sheriff of Morgan county, and on February 27th, 1915, return made that the judgment was unsatisfied, except to the extent of \$2,000, and that after diligent search by the officer, no other property than that sold to obtain the said sum of \$2,000 was found upon which to levy. That on February 9th, 1915, execution was issued directed to the sheriff of the city and county of Denver to satisfy the remainder due on said judgment in the sum of \$1,516.44 and returned wholly unsatisfied, and no property found.

That on November 22nd, 1914, and subsequent to the commencement of the action in which said judgment was obtained the defendant Knotek conveyed, by three separate warranty deeds, three certain pieces of real estate situated in the city and county of Denver, and described in the complaint, to his brother-in-law, Harry Chalupa.

That these deeds were without consideration, and with the intent and purpose to hinder, delay and defeat the plaintiff in the collection of his judgment, and were received by the grantor with full knowledge of such intent.

Further, that Knotek has no other property within the state of Colorado from which plaintiff can realize his judgment.

It was further alleged that there has been no change of possession of said properties, but that Knotek continues in possession of the same, to reside in one, and to collect the rent from others, to pay the taxes, and to treat the same as his own. Prayer was for the cancellation of said deeds, and for foreclosure of the judgment lien.

Separate answers were filed in behalf of Knotek and Chalupa which in substance, admit the judgment, admit the sale under execution, but allege a subsequent execution and sale thereunder, from which there was realized more than \$2,000, and declaring that there was not to exceed the sum of \$1,000 due on said judgment. Admit the conveyances and allege them to be in good faith, and that Chalupa is the bona fide owner of the properties for consideration.

It appears that the original cause of action arose upon a promissory note secured by mortgage upon the premises in Morgan county, afterward sold under execution. That in the purchase of the premises, Knotek had assumed and agreed to pay the indebtedness secured by the mortgage, but suit was brought on the note, and a levy made on the land. It also appears that the court set aside the first execution sale, and the property was sold under a second execution, and the court in this trial found there was still due the plaintiff the sum of \$1,186.80.

The trial court found for the plaintiff in this case, adjudged the conveyances to be null and void, and held the plaintiff entitled to a lien on said premises for the amount due and unpaid on the judgment, and directed execution and sale of the premises as the property of Knotek.

The errors assigned and important to consider are that equity will not lie in this case, in that plaintiff had not exhausted his remedy at law; and that the evidence was insufficient to justify the finding of the court that the conveyances were made with the intent to hinder, delay and defraud the creditors of Knotek.

It is contended that the original judgment was against Chalupa and another, as well as against Knotek, and that execution should have been issued against these with a return of no property found, before the plaintiff was entitled to equitable relief, and authorities are cited from some other states which seem to support this contention.

But the law upon this question may be regarded as well settled in this jurisdiction. *Stockgrowers Bank v. Newton*, 18 Colo. 245, 22 Pac. 444; *Schofield v. Ute, etc., Co.*, 92 Fed. 269, 34 C. C. A. 334, involving a Colorado case; *Allen v. Tritch*, 5 Colo. 222; *Emery v. Yount*, 7 Colo. 107, 1 Pac. 686; *Mulock v. Wilson*, 19 Colo. 296, 35 Pac. 532; *Helm v. Brewster*, 42 Colo. 25, 93 Pac. 1101; *Thuringer v. Trafton*, 58 Colo. 250, 144 Pac. 866.

In *Allen v. Tritch*, *supra*, it was said:

"The right of a judgment creditor to equitable relief in case of the fraudulent transfer of real estate by the judgment debtor is well settled. He may maintain his action to cancel the fraudulent conveyance before execution."

In *Stockgrowers Bank v. Newton*, *supra*, it was held:

"A judgment creditor desiring to set aside a supposed fraudulent deed of real estate may bring his action therefor to test the validity of the deed, before attempting to subject the premises to execution sale; or the purchaser, after such sale, may bring his action to remove the cloud from the title by canceling the supposed fraudulent deed, and to recover possession of the premises."

It will be observed that the judgment lien in this case had attached to the real estate of Knotek in the City and County of Denver, by the filing of a transcript of judgment with the Clerk and Recorder of that county, before the institution of this suit.

The rule is well stated in *Schofield v. Ute, etc., Co.*, *supra*, pointing out the two classes of cases of the character in which equity may be invoked. It was there said:

"But there are two classes of cases in which a judgment creditor may successfully invoke the aid of a chancellor because his remedy is insufficient.

One class includes the cases in which his remedy at law is utterly ineffectual to reach the property of his debtor, or to fasten any lien or claim upon it, as where a creditor's bill is exhibited to reach choses in action, equitable interests, or property of the judgment debtor that has been fraudulently conveyed beyond the reach of the judgment and execution.

The other class embraces those cases in which the creditor has secured a lien or right at law, the enforcement of which is obstructed by some fraudulent conveyance or incumbrance. * * *

In the second class of cases to which we have adverted, however, the lien or vested right in the property, and the

fraudulent obstruction to the adequate enforcement of this lien, or right, are the only essentials to the jurisdiction of a court of equity. Equity relieves, not, as in the former class, because the remedy at law has created no lien and has no effect, but because the enforcement of the lien secured by the legal remedy is rendered so much less efficient by the fraudulent obstruction that it is inadequate. It is the inadequacy, and not the utter futility, of the remedy at law, which conditions the jurisdiction in this class of cases; and the return of an execution unsatisfied is neither the sole nor the best evidence of this inadequacy. In many cases this inadequacy cannot be shown at all by the return of the execution because it is possible to levy the same upon the property upon which the lien is fastened, and to sell the property thereunder, notwithstanding the fraudulent incumbrance or conveyance. The difficulty is that the fraudulent mortgage, trust deed, or other obstruction compels the purchaser under the execution to buy a lawsuit, and so depreciates the value of the property at the sale that the creditor's remedy is rendered insufficient, and sometimes without any practical value. In such case, he is not required to proceed with this sale, and thus sacrifice both his own interest and that of his debtor, but he may successfully appeal to equity to remove the fraudulent obstruction before he proceeds with the sale. *Bank v. Newton*, 13 Colo. 249, 250, 22 Pac. 444, and cases there cited. * * *

Under the statutes of Colorado * * * the lien of a judgment attaches to the real estate of the debtor when the judgment, or a transcript of it, is recorded or filed in the proper office in the county where the land is situated. * * *

The levy of an execution upon it could not make this lien more specific or more efficient, and the conclusion is irresistible that the general lien upon the real estate created by entering a judgment or filing a transcript of it in the county where the lands of the debtor are situated, in accordance with the statutes which provide therefor, is a sufficient basis for the maintenance of a suit in equity to

remove a fraudulent obstruction to the enforcement of that lien."

And again in *Thuringer v. Trafton*, *supra*, it was held:

"The simple fact that plaintiff in error had not reduced his cause of action to judgment before Trafton made the transfers to his wife, is immaterial. At the time he was a creditor within the meaning of section 2671, R. S., which provides in substance that every conveyance of any interest in land made with intent to hinder, delay or defraud creditors, shall be void. The object of this statute is to protect creditors, and it makes no difference whether their claims have been reduced to judgment or not, at the time of the conveyance."

As to the sufficiency of the evidence upon which the court based its finding that the deeds were void as being for the fraudulent purpose of hindering and delaying the creditor, it appears that Chalupa was a sort of a "Will O' the Wisp," character. We discover no evidence of his existence in the record, save the testimony of Knotek. He testifies that Chalupa is his brother-in-law, that he came to Denver in the winter before the execution of the deeds; that he was a common laborer and worked at different occupations after coming to Denver.

He could not be found for personal service in this suit. Service was made on him by publication. An answer was filed for him by counsel. Diligent effort was made by the plaintiff to secure service of subpoena on the trial. Knotek was called upon to ascertain his whereabouts, but said he could give no information in that regard.

The consideration for the conveyances; as testified to by Knotek was \$800.00 in cash; a deed for a tract of land in Oklahoma, and 5,000 shares of the capital stock in a mining corporation.

Of the cash item Knotek says, I left in my house until I used it up, left it upstairs in my room. I left it under my pillow when I wasn't using it. I kept it in the bed until I used it up. No other witness testifies as to the existence of any such money.

The certificate of stock was for 5,000 shares of the capital stock of the Adams Copper Mining & Refining Co. The proof shows that the certificate was issued in a name other than either Chalupa or Knotek. That at the time Knotek says he received it, the corporation was defunct. Knotek testifies "I made no investigation as to what the assets of the corporation were worth. Did not counsel with any of the officers of the company. I didn't ascertain whether the company had an office in Denver or not, or whether the company had paid any dividends. Did not investigate as to whether or not the company was a going concern. Did not make any investigation as to the value of this stock."

As to the deed for the Oklahoma land Knotek testified in substance, "Don't know from whom Chalupa obtained it. Did not investigate at the time. It was an open deed. The grantee was not filled in. It passed by mere delivery from one person to another. I did not investigate the title. I made no investigation—did not go to look at the land—did not write about it. I made no investigation whatever either as to Ferguson the grantor, or as to the land, or any detail regarding it."

The proof shows that the title to the land had passed from the grantor to a third person before Knotek says he received the deed. The deed was simply so called "traders deed" executed in Nebraska for land located in Oklahoma.

Witness Roberts, who at one time owned the Morgan county land and had assumed and agreed to pay the debt thereon, and was a defendant in the original suit, testified that he went to see Knotek after the institution of the suit, and that Knotek told him that he was all right, and that he had his property or affairs so fixed that it didn't worry him. He was jubilant, laughed over it and said he was so fixed that it didn't worry him. The proof also shows that there was no change of possession of the premises. That Knotek continued to live in the one house, and to collect rent from the other. That he paid the taxes though he says he made settlement with Chalupa, but offers no corroborative evidence.

It is a rule in the case of such transactions between relatives, that the burden of proof, is on the parties to the transfer to clearly establish, that the transaction was honest. In the case of *Helm v. Brewster*, 42 Colo. 25, 93 Pac. 1101, it was said:

"Many decisions of courts of last resort in actions by creditors of a husband to set aside conveyances of property to his wife are reported, with the result that in this class of cases it has been firmly established that when a conveyance by an insolvent debtor to his wife is attacked by a creditor of the former at the time of such conveyance, the husband and wife are required to clearly establish that the transaction was honest, and that there was no intent to hinder and defraud such creditor."

The same principle is applicable as to transactions between relatives other than husband and wife. *Greig v. Jones*, 66 S. C. 171, 44 S. E. 729; *Kerr v. Kennedy*, 119 Ia. 239, 93 N. W. 353.

The court had the witnesses before him and was the judge of their credibility. We think the court was entirely justified in finding that the conveyances by Knotek were made with the fraudulent intent and purpose of delaying and hindering his creditors.

The judgment is affirmed.

Hill, C. J., and Garrigues, J., concur.

No. 9137.

GABRIN v. BRISTER.

WITNESS—*Competency—Executrix Party.* One who, being sued both in her individual capacity and as executrix, defends solely in her individual right, cannot exclude the testimony of plaintiff (Rev. Stat. sec. 7267).

*Error to Denver District Court, Hon. Chas. Cavender,
Judge.*

Department.

Messrs. HINDRY, FRIEDMAN & BREWSTER, for plaintiff in error.

Mr. JAMES C. STARKWEATHER, Messrs. DAYTON & DENIOUS, for defendant in error.

Opinion by Mr. Justice Teller.

The plaintiff in error was plaintiff below in a suit against defendant in error to have the latter adjudged a trustee of the title to a certain lot in the City of Denver, of which plaintiff claimed the equitable ownership.

The complaint alleged that the plaintiff had for several years taken care of a Mrs. Marlow,—an aunt of defendant,—under the promise by said Marlow that she would give to plaintiff the said lot as compensation for such care; the extent of the services rendered was set out at some length, and it was further alleged that said Marlow executed a will, in performance of said agreement, whereby she devised to plaintiff the said lot; that a few days before the death of said Marlow the defendant came to Denver, and induced said Marlow to convey to her, by deed, the lot in controversy,—defendant at the time having full knowledge of said contract, and that said will had been made in compliance therewith,—and that said Marlow thereafter made a new will giving all the residue of her property to defendant. The prayer of the complaint was that the defendant be decreed to hold said lot as trustee for the plaintiff, and that she be directed to convey the same to plaintiff.

Defendant demurred to the complaint on the ground that the personal representative of the deceased Marlow was a necessary party to the suit.

The demurrer was sustained, and the complaint was amended, under protest, and the defendant, as executrix of the will of Marlow, deceased, was made a party defendant.

The answer of defendant, individually and as executrix, denied the making of the alleged contract, and alleged that defendant claimed title in fee simple to said property under the deed from said Marlow to her,

A demurrer to the answer, on the ground, among others, that there was nothing in it to show an interest in the property, or any title or right in the executrix, was overruled.

On the trial, the judge—sitting as a successor to the judge who had settled the pleadings—noted the fact that the answer “shows, in one sense, that Mrs. Brister, as executrix, claimed no interest, that is, that she claimed through a deed, * * * and that she claimed solely through that deed.” Nevertheless, he said, he felt bound by the rulings made on the pleadings, and hence sustained an objection to any testimony by the plaintiff concerning the alleged contract with the deceased; the objection being based upon the fact that Mrs. Brister was defending as executrix, the plaintiff, in such case, being barred by the statute from testifying.

The plaintiff's counsel then made an offer to show by her the making of such contract, and the offer was refused.

These rulings are the principal grounds urged for the reversal of the judgment, though error is assigned also on the order requiring the executrix to be made a defendant.

As to the latter question, defendant in error relies on a waiver resulting from the filing of an amended answer in compliance with the order to make the executrix a party.

In our view of the case it is not necessary to determine that question; though it would seem that, when the defendant answered that she claimed a title in fee simple, under the deed, she could not claim by a technical waiver, if there were one, something as a fact which she had shown by her answer not to exist.

Even if the executrix were a necessary party, the plaintiff was a competent witness as against Mrs. Brister in her individual capacity as defendant, under our holding in *Nesbitt v. Swallow*, 164 Pacific 1163.

When Mrs. Brister had made it clear, both by her answer, and by her testimony, as she did, that she claimed only under the deed, she had no right to exclude the testimony of

plaintiff as incompetent under the statute. It could not be excluded unless it "unquestionably appears that the party invoking its protection is suing or defending in his representative capacity." *Prewitt v. Lambert*, 19 Colo. 7, 34 Pac. 683. Defendant was allowed the protection of the statute in her individual capacity, which the law does not authorize.

The sustaining of the objection was error, for which the judgment is reversed.

Judgment reversed.

Chief Justice Hill and Mr. Justice White concur.

No. 9138.

STATE BOARD OF MEDICAL EXAMINERS v. NOBLE.

CERTIORARI—*Questions Involved.* On certiorari to review an order of an administrative body the only questions presented are. Did the Board exceed its jurisdiction, or abuse its discretion? The merits of the controversy are not involved (Rev. Code sec. 331).

Error to Denver District Court, Hon. John H. Denison, Judge.

Department.

Hon. LESLIE E. HUBBARD, attorney general; CHARLES H. HAINES, RALPH E. C. KERWIN, for plaintiff in error.

THOMAS WARD, JR., for defendant in error.

Opinion by Mr. Justice Teller.

THIS cause is before us on error to the District Court of the City and County of Denver to review a judgment entered on a writ of certiorari to the State Board of Medical Examiners, which judgment reversed the action of the board in revoking the license of defendant in error to practice medicine in this state.

The board, on a hearing had upon a complaint charging defendant in error with having committed an abortion, found him guilty as charged, and revoked his license.

In the trial court it was contended that a judgment of acquittal in the Criminal Court, on the charge of having committed an abortion, was a determination of his innocence which the State Board was bound to accept, and it is so contended here. But that goes to the merits of the cause, which is not involved in this proceeding.

The Medical Board had jurisdiction of the subject and of the person, and clearly did not exceed its jurisdiction, or abuse its discretion. On a review of its action by writ of certiorari, those are the only questions to be considered: sec. 297, M. A. Code. Whether its decision on the merits is right or wrong is not within the issue. *Thompson v. State Board*, 59 Colo. 549, 151 Pac. 436. No complaint is made that the defendant in error did not have a fair hearing before the board; and that body's action was within the authority granted it by law.

The judgment of the District Court is unauthorized, and is reversed.

Judgment reversed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9148.

KALBERER *v.* WILMORE.

1. APPEAL AND ERROR—*Verdict on Conflicting Evidence*, sufficient to sustain the conclusions of the jury, will not be disturbed.
2. FRAUDULENT CONVEYANCE—*Intent to Delay Creditor*. One who disposes of his property merely to delay his creditors, or a particular creditor, exposes himself to an attachment, even though he intends to faithfully discharge all of his obligations. (Rev. Code sec. 98.)

*Error to Denver District Court, Hon. Chas. C. Butler,
Judge.*

Messrs. ALLEN & WEBSTER, for plaintiff in error.

Mr. CHARLES A. MURRAY, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS was an action by the defendant in error against the plaintiff in error on account. It has been before the Appellate Courts twice before. 24 Colo. App. 209, 133 Pac. 763; 61 Colo. 136, 156 Pac. 593.

There was a writ of attachment issued and apparently undetermined upon former trials. The sole question here arises upon the trial of the traverse to the affidavit in attachment. This question was tried to a jury. The court instructed the jury as follows:

"1. The issue now on trial in this case is presented by plaintiff's affidavit in attachment and defendant's traverse thereof.

The affidavit charges, as grounds for the attachment herein, that said defendant had fraudulently conveyed, transferred and assigned his property and effects so as to hinder and delay his creditors, and especially this plaintiff.

The defendant by his traverse denies this allegation, which denial puts upon the plaintiff the burden of proving the allegation by a preponderance of the evidence, and if the plaintiff has done so your verdict should be for the plaintiff; otherwise your verdict should be for the defendant.

2. Under the charge made in the plaintiff's affidavit, that the defendant had fraudulently conveyed and assigned his property so as to hinder and delay his creditors, the plaintiff is not required to show that the defendant was guilty of an actual or dishonest intention to cheat plaintiff or any other of his creditors. If the defendant put his property beyond the reach of the plaintiff or his creditors for the purpose of hindering and delaying his creditors, or this plaintiff, even though he may have intended eventually to pay him and them, still such act would be fraudulent within the meaning of the law."

The court refused the following instruction tendered by defendant:

"If a mortgagor, with the consent of the mortgagee, disposes of a portion of the mortgaged property for the sole purpose of conserving the remainder of the mortgaged property, under circumstances which render the same necessary for such conservation, then such disposition of the property is not fraudulent."

That the court erred in its refusal to give this instruction and that the evidence was wholly insufficient to sustain the attachment are the only assignments of error that require consideration.

The instruction tendered is but a converse statement of the law as stated in the last paragraph of the instruction given.

While the testimony is conflicting, there appears sufficient to justify the finding of the jury, and the verdict will not be disturbed.

The judgment is affirmed.

Garrigues, J., and Bailey, J., concur.

No. 9179.

GIBBS ET AL. v. SECURITY TRUST AND SAVINGS BANK.

1. **APPEAL**—*County Court to District Court—Bond.* An appeal from the County Court to the District Court is not to be dismissed merely because the surety is disqualified by statute to enter into the contract of suretyship, nor because, the appellant being a corporation, the bond is subscribed by an officer not having authority—provided a good and sufficient bond is filed. (Rev. Stat. sec. 1539.)
2. **PARTIES**—*Necessary—At Law.* Action upon promissory note by endorsee. The answer alleged that plaintiff held the notes merely for collection, and received them with full knowledge of facts set up in the answer showing want of consideration. Held that the payee named in the notes was not a necessary party.
3. **JUDGMENT**—*When a Bar.* Action upon promissory notes. On the same day with its institution plaintiff brought replevin to

recover certain chattels, mortgaged to secure the payment of the notes, and recovered judgment by default therein. Inasmuch as there was no answer in the action of replevin, no judgment could have been given save for the property demanded in the complaint. The judgment in the action in replevin was therefore no bar to the action upon the notes.

Error to Las Animas District Court, Hon. A. C. McChesney, Judge.

Department.

Messrs. ALTER & UPTON, for plaintiffs in error.

Messrs. DANA & BLOUNT, for defendant in error.

Opinion by Mr. Justice Teller.

This cause, an action on promissory notes by an assignee thereof, was first tried in the County Court of Las Animas County, where defendants had judgment on a directed verdict. The plaintiff, defendant in error here, prayed an appeal to the District Court, and filed therein an appeal bond which was signed by it, per "C. F. Tipton, its agent," The First National Bank of Trinidad signing as surety.

The defendants below thereupon moved to dismiss the appeal on the ground that the bond was not signed by the principal or any of its authorized agents, and that it was not signed by a surety. This motion was denied on condition that a sufficient bond be filed, and such bond was duly filed.

It is now contended that the court erred in overruling said motion, it not appearing that Tipton was authorized to execute the bond, and the surety, a National Bank, not being competent to become such surety. Counsel assert that the instrument was void. We can not agree with that contention. The instrument was a bond in form, purported to be executed by the principal and a surety, and was duly approved as such by the court. In the motion it is attacked as "defective, insufficient and void." The statute, sec. 1539, R. S. 1908, prohibits the dismissal of an appeal because the

bond is informal or insufficient, and requires the court to allow a new bond to be filed in case the original bond is deemed insufficient.

In *Wheeler v. Kuhns*, 9 Colo. 196, this court held it was error to refuse an application to file a new bond where the first bond was not signed at all by the principal. It was there said of the statute:

"Under this authority, the purpose of the law is accomplished where a good and sufficient bond is approved and filed; nor is it important whether the insufficiency of the original instrument consists in some merely formal omission, or whether the defect complained of be a failure to comply with the most material requirement of the statute. The approval of the court which tried the cause of the imperfect obligation, given in good faith, and the transmission thereof to the appellate tribunal, entitles appellant to the benefit of the corrective statute."

The bond was merely defective, and there was no error in overruling the motion to dismiss.

Error is alleged, also, in the denial of a motion to make the payee of the notes a party defendant. The amended answer alleged that the plaintiff was not the owner of the notes, that it held them merely for collection, with full knowledge of the several facts which are set out in the answer to show want of consideration. If these allegations were established, the plaintiff was not a holder in due course, and the equitable defenses were good against it. There was, therefore, no necessity for making the payee a party.

It appears that the notes in suit were secured by a chattel mortgage upon a traction engine, and that defendant in error, on the day on which it began suit on the notes, began also an action in replevin to recover possession of the engine, in order to foreclose the mortgage thereon. In that action judgment was entered awarding the plaintiff the possession of said engine. It appears from the briefs that the defendants in the replevin action filed no answer and suffered judgment by default.

This judgment was pleaded in bar to the suit on the notes, and it is now contended that the right to recover on the notes might have been determined in the replevin action, and hence can not now be litigated. The complaint in the replevin suit set out the giving of the notes and the chattel mortgage, and default on payment, and prayed that a writ of replevin issue and that plaintiff be adjudged the owner and entitled to possession of the mortgaged property.

While it is true, as counsel assert, that all matters which might have been litigated under the issues as incident to, or necessarily connected with, the subject matter of the controversy are excluded from future litigation, whether determined or not, it does not follow that the judgment in the replevin action is a bar to a suit on the notes, under the circumstances here presented. There being no answer filed, the relief could not have included judgment for the amount due on the notes. It could cover only what was demanded in the complaint (Sec. 186 of Code, R. S. 1908), and that was possession of the engine. It can not therefore be assumed that the question of recovery on the notes was determined.

The money demand on the notes not having been litigated, the plaintiff still had a right of action, and the trial court did not err in refusing to enter judgment on the pleadings in favor of the defendants.

The judgment is accordingly affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice White concur.

No. 9189.

HARGIS v. ROYAL FUEL COMPANY.

PLEADING—*Evidence.* Evidence of the breach of a contract is not admissible where no contract is alleged.

Error to Denver District Court, Hon. Chas. C. Butler, Judge.

Mr. EDMUND J. CHURCHILL, for plaintiff in error.

Mr. RALPH HARTZELL, for defendant in error.

Opinion by Mr. Justice Allen:

THIS is an action wherein the plaintiff seeks to recover damages for personal injuries. The complaint alleges, in substance, that the plaintiff was a servant of the defendant; that as such servant his work consisted in mining coal; that as a part of his work he attached a fuse to a charge of dynamite for the purpose of blasting out coal and rock; that on a certain date the defendant "negligently and carelessly furnished and provided for the plaintiff's use" a defective fuse; that plaintiff used the fuse in the usual manner, and that because of the defect a premature explosion of a charge of dynamite took place, resulting in the injuries. It is alleged that the premature explosion was due proximately and directly to the negligence of the defendant. The form of the action as framed by the complaint is *ex delicto* and recovery of damages is sought to be grounded upon negligence.

Upon trial and at the conclusion of plaintiff's evidence the court granted defendant's motion for a nonsuit. The plaintiff has sued out a writ of error.

The theory of the plaintiff in error is that under the allegations of the complaint the form of the action may be deemed to be *ex contractu*, and that the defendant is liable as for the breach of an implied warranty with reference to the quality and fitness of the fuse in question. It is contended that the evidence should have been submitted to the jury on this theory. We are of the opinion, however, that the complaint states no cause of action on a breach of contract, and no such cause of action being stated, there can be no recovery on the ground of any liability *ex contractu*. *D. & R. G. R. R. Co. v. Iles*, 25 Colo. 9, 52 Pac. 211. There was no error in granting the nonsuit.

The judgment is affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9195.

COLORADO TENT AND AWNING COMPANY v. DENVER COUNTRY CLUB.

1. APPEAL AND ERROR—*Presumptions*. A court of review in considering the sufficiency of the evidence will make all inferences fairly deducible from the evidence, to support the judgment.
2. ESTOPPEL—*Accord and Satisfaction*. The acceptance of a check bearing an endorsement to the effect that it is "Payment in Full", is in effect an accord with satisfaction, and precludes a further recovery.

Error to Denver County Court, Hon. W. C. Hood, Jr., Judge.

Mr. JOHN HORNE CHILES, Mr. ARNOLD WEINBERGER, for plaintiff in error.

Messrs. SYMES & FARRAR, Mr. IVOR O. WINGREN, for defendant in error.

Opinion by Mr. Justice Allen:

THIS is an action wherein The Colorado Tent and Awning Company, hereinafter called the plaintiff, seeks to recover from The Denver Country Club, hereinafter referred to as the defendant, the sum of \$75 alleged to be due plaintiff from defendant for the rental of wares and merchandise.

The case was tried in the County Court, without a jury. The trial judge found for the defendant, and judgment was rendered accordingly. The plaintiff brings the case here upon writ of error, contending and assigning as error that the finding and judgment are contrary to the law and the evidence.

On October 10, 1914, the defendant mailed to plaintiff a check for \$324.58. The check was tendered as payment in full of the account existing between the parties, and on the back thereof contained the following endorsement:

"Endorsement hereon is an acknowledgment of payment in full of the account stated on the face of this check."

A witness for the plaintiff testified that on October 13, 1914, the plaintiff returned the check by mail to the defendant, with a letter stating, in part, as follows:

"We are returning herewith your remittance of the 10th inst., as you have sent this check marked 'in full payment,' which is incorrect, as the total amount of the account is \$399.58."

In the testimony introduced by the defendant it is denied that the defendant received the above mentioned letter, but it is claimed that the check was brought back to the defendant, at its place of doing business, by the plaintiff's representative in person. It is not disputed, however, that the check was not accepted by the plaintiff when first received by it, and that thereafter a conversation took place between representatives of the parties with reference to the account and the check.

The testimony of the plaintiff is to the effect that, as a result of this conversation, the check was accepted as a part payment of the account, and that the defendant owes the amount now sued for as a balance due. The testimony of the defendant, on the other hand, is to the effect that after the check was returned, the defendant continued to tender it to plaintiff as payment in full of the account; that the defendant never agreed or consented that the check should be applied by plaintiff as a part payment; and, that in the conversation last mentioned, the representative of the plaintiff remarked that, if he accepted the check, he "would not get anything else." The uncontradicted testimony shows that after this conversation the defendant retained, and on or about the 5th of November, 1914, cashed, the check which then still bore the endorsement, hereinbefore set forth, containing the words, "payment in full."

On reviewing the sufficiency of the evidence to support the judgment, the Appellate Court will draw every inference fairly deducible from the evidence in favor of the judgment, especially where, in a case tried by the court without a jury, no findings of fact or conclusions of law were filed. 4 C. J. 786, sec. 2739.

The testimony contained in the record should be viewed in the light most favorable to the party successful in the trial court, in this case the defendant. *Sebold v. Rieger*, 26 Colo. App. 209, 142 Pac. 201. Applying the rules above stated, we are of the opinion that the evidence warrants the conclusion that the plaintiff accepted, retained and cashed the check in question with the knowledge that the same was tendered by the defendant on condition of being a payment in full of the account between the parties. This being true, the taking of the check was an acceptance by the plaintiff of the conditions on which it was offered, all of which constituted an accord and satisfaction, precluding the plaintiff from the right to recover anything more on the account. *C., R. I. & P. Ry. Co. v. Mills*, 18 Colo. App. 8, 69 Pac. 317; *Berdell v. Bissell*, 6 Colo. 162.

The evidence on the issue whether or not the check was finally accepted and cashed by the plaintiff under circumstances creating an accord and satisfaction is conflicting, but at the same time is sufficient to support the judgment.

The judgment is affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9200.

WISE ET AL. v. TONER.

PROCESS—*Service of where Sheriff Party.* Where the sheriff is a party to the cause all process therein must be served by the Coroner. (Rev. Stat. sec. 1298.)

Service of the summons by the sheriff is void.

Even though the sheriff has no interest in the controversy, the result is the same.

If a proper party, e. g., as trustee holding the legal title to the lands which are in controversy in the action he is disqualified.

Error to Yuma District Court, Hon. H. P. Burke, Judge.

Mr. M. M. BULKELEY, Mr. ISAAC PELTON, for plaintiffs in error.

Mr. JOHN F. MAIL, for defendant in error.

Opinion by Mr. Justice Allen:

THIS is an action in partition as to certain defendants, and an action to quiet title against certain other defendants, including John Toner, the defendant in error, and Chas. A. Bullard, sheriff of Yuma County, Colorado, successor in trust to Collier Hendrie, deceased. Default of the defendants against whom title was sought to be quieted was entered, and thereupon a decree against them was granted. Thereafter the defendant Toner moved to vacate and set aside the judgment on the ground "that no service of summons was ever made upon him" in this action. The motion was sustained. Toner then filed his answer, claiming to be the owner of a certain note and trust deed, and that the same is a valid and subsisting lien upon the land involved in the suit. Upon trial a decree was entered in his favor.

The plaintiff below and certain defendants whose interests are adverse to those of Toner bring the cause here for review. The particular action of the trial court that is complained of is the sustaining of the motion to vacate the judgment.

The trial court evidently sustained the motion on the one ground therein stated and upon the theory that the service of summons upon the defendant Toner, the moving party, was void. The record shows that the service in question was made by the sheriff personally, and that the sheriff, Chas. A. Bullard, is one of the defendants in this action. It is provided in section 1298 R. S. 1908 that the "Coroner shall serve and execute process of every kind and perform all other duties of the sheriff when the sheriff shall be a party to the case." This court, in *General Film Co. v. McAfee, Sheriff*, 58 Colo. 344, 145 Pac. 707, where this same statute was involved, said:

"The sheriff was the defendant in the action. The statute provides, in clear terms, that in such case the coroner shall execute process of every kind and perform all other duties of the sheriff. The statute is mandatory * * *."

It is contended by plaintiffs in error that the above statute is not controlling in this case because, as they claim, the sheriff here "was only a nominal party" and "had no real interest in the case."

The record shows that the sheriff, as successor in trust to Collier Hendrie, deceased, was the present trustee under the deed of trust found to be held by the defendant Toner. As such trustee he held the legal title to the land involved in this suit. "A trustee holding the legal title to the premises in controversy, although he has no beneficial interest therein, is a proper party to a final determination of the controversy." 4 Sutherland on Code Pl. & Pr., sec. 6226, p. 3428, citing *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449. The sheriff was a proper party in the instant case. Whether or not the defendant sheriff had any pecuniary interest in the case is immaterial, since in either event he was "a party to the case" within the meaning of the statute. The term "party" as used in statutes of this kind means the person whose name is expressly mentioned in the record as plaintiff or defendant, or one of the plaintiffs or defendants. *Douglass v. Gardner*, 63 Maine (3 Smith) 462; *Merchants' Bank v. Cook*, 21 Mass. (4 Pick.) 405.

In our opinion, no sufficient reason is shown for reversal of the judgment. It is therefore affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9211.

WESTON v. WILKES.

1. EVIDENCE—*Self Serving Declarations—Book Entry.* Where the terms of a parol contract are in question an entry in the day book of one of the parties is inadmissible to establish his contention.
2. — *Secondary Evidence—Copy of Writing.* To receive in evidence a copy of a letter alleged to have been written by plain-

tiff to the defendant, without sufficient notice proved to produce the original, is error.

Error to Fremont District Court, Hon. James L. Cooper, Judge.

Messrs. JEFFREY & STINEMEYER, for plaintiff in error.

Mr. JAMES T. LOCKE, Mr. JOSEPH H. MAUPIN, for defendant in error.

Opinion by Mr. Justice Allen:

THE plaintiff below, an attorney at law, brought this action against the defendant to recover a sum alleged to be due under a parol contract for professional services. The complaint alleges, in substance, that the defendant employed plaintiff to bring and conduct a suit for the foreclosure of a deed of trust, and agreed to pay plaintiff the sum of \$500 for such services, that the services were performed, and that there remains due under the contract the sum of \$400.

The defendant filed an answer admitting the employment and the performance of the services, but denying such agreement for compensation as pleaded by the plaintiff. In a cross-complaint the defendant alleged, in substance, that the plaintiff was employed by defendant to foreclose a certain deed of trust and was to receive for his services the sum of \$500, to be paid by defendant, and the further sum of two-fifths of the amount that should be allowed by the court in the foreclosure suit to the trustee, as counsel fees; that in consideration of the payment of the sum of \$500, the defendant was to receive the remaining three-fifths of the amount allowed to the trustee; that at or about the time of the agreement the defendant paid plaintiff \$100; that upon the final disposition of the foreclosure suit the court allowed the sum of \$1,000 to the trustee as counsel fees; that this sum was received and retained by the plaintiff; that the defendant was and is entitled to receive three-fifths of this amount, less \$400 due to plaintiff; and that, by the terms of the agreement, the plaintiff owes the defendant, as a balance due, the sum of \$200.

To the cross-complaint the plaintiff filed a general denial. Upon trial, before a jury, the issues were found in favor of the plaintiff. Thereafter, a motion for a new trial being overruled, judgment was entered upon the verdict. The defendant brings the cause here for review. The errors assigned relate to the admission in evidence, over the objections of defendant, plaintiff's exhibits "A" and "J."

Exhibit "A" was identified by the plaintiff as his "day book" containing the entries made at the time of, and concerning, the transaction with defendant. Exhibit "A," as the same appears in the record, is in the following words and figures:

"1912—January 17—A. A. Weston—500 dollars—to services—500 dollars—his part of fee agreed in suit of R. G. Co. and in addition I get such fee as allowed by court."

"(Same date.) Cash 100 dollars—to A. A. Weston—retainer by A. A. Weston as above and his payment on account."

Prior to the identification of Exhibit "A" the plaintiff testified fully as to the terms of the contract alleged by him to have been made. The exhibit in question was not used or offered for the purpose of refreshing the recollection of the witness. Under these circumstances it was evidence made by himself in corroboration of himself. *Weaver v. Bromley*, 65 Mich. 212, 31 N. W. 839.

The book entry, or the day book, as introduced in evidence, contained, in addition to the debits and credits, the plaintiff's own version of the contract. He designates the \$500, written in the entry, as the defendant's "part of the fee," and in the same memorandum adds the words, "and in addition I get such fee as allowed by the court." The foregoing memorandum included in, or attached to, the entry rendered Exhibit "A" inadmissible. "It is improper to permit a party to introduce in evidence an entry in his books showing his version of a parol contract." 3 Jones (Blue Book) on Evidence, sec. 568, citing *Collins v. Shaw*, 124 Mich. 474, 83 N. W. 146, and *Batcheller v. Whittier*, 12 Calif. App. 262, 267, 107 Pac. 141.

In *Batcheller v. Whittier*, *supra*, the action was to recover compensation for legal services. The plaintiff offered an account book containing the entry, "agreed fee to be one-half." The court said that such an entry is a mere memorandum of a special contract and had no proper place in an account book, citing 2 Wigmore on Ev., sec. 1541. In *Stidger v. McPhee*, 15 Colo. App. 252, 256, 62 Pac. 332, it was said that a book entry can not be used to prove a special contract.

Exhibit "A" was clearly inadmissible under the foregoing authorities, and under the rule stated in 17 Cyc. 380 that "books of account * * * are inadmissible to prove the terms or contents of a special agreement." Cases on this point are collected in 17 Cyc. 380, note 52, and subsequent annotations; 52 L. R. A. 711; 138 Am. St. Rep. 470; 2 Wigmore on Evidence, sec. 1541, and note; and 2 Enc. of Evidence, 658.

Exhibit "J," offered and received in evidence, was a carbon copy of a letter purporting to have been written by the plaintiff to the defendant concerning the transaction involved in the instant case. There was no sufficient notice given for the production of the original. No foundation was laid for the introduction of the carbon copy instead of the original. The admission of this evidence was clearly error under the rule announced in *Young v. U. S. Bank and Trust Co.*, 27 Colo. App. 331, 148 Pac. 919.

For the errors above indicated, the judgment is reversed and the cause remanded.

Reversed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9218.

BURNS v. WRAY FARMER'S GRAIN COMPANY.

1. CORPORATIONS—*By-Laws—Validity*, is determined by the same tests as the validity of a contract.
2. —*Restraint of Trade*. It is not necessary to the invalidity of a

by-law that it was deliberately framed with the intent to suppress competition.

Nor that its result is a monopoly.

The by-laws of a corporation dealing in grain provided that any stockholder selling grain to a competitor of the corporation should pay to it one cent upon each bushel so sold. *Held* an unreasonable restraint of trade.

Error to Yuma District Court, Hon. H. P. Burke, Judge.

Mr. LOUIS HENKE, for plaintiff in error.

Mr. M. M. BULKLEY, for defendant in error.

Opinion by Mr. Justice Allen:

THIS is an action brought by The Wray Farmers' Grain Company, a corporation, against one of its stockholders, to recover a sum of money alleged to be due to the corporation under the provisions of a certain by-law of the company. The plaintiff obtained a judgment, and the defendant brings error.

The main question presented for our determination is the validity of the by-law upon which the plaintiff's right to recover is predicated.

It is proper, at the outset, to note the following admitted and undisputed facts:

The plaintiff is a corporation, organized under the laws of Colorado, and having its principal place of business and its office in the town of Wray, Colorado. Its business is that of buying, selling and storing grain, and dealing in hogs and in coal. It buys and sells to "members and non-members." The capital stock of the plaintiff corporation is divided into 400 shares of \$25 each. There are 230 stockholders. The defendant is a farmer residing near the town of Wray, and owns two shares of the capital stock. The following is a by-law of the plaintiff, being the by-law which is involved in this controversy:

"The stockholders of this company may sell grain to competitors in Wray, only, by paying to the secretary of The Wray Farmers' Grain Company, the sum of one cent per

bushel for each bushel of grain so sold, as his proportional share of the maintenance of the company; provided grain sold to local feeders and grain sold for seed for use in our immediate locality, which shall be exempt from penalty. If any stockholder is found guilty of avoiding this by-law, his stock shall be liable to forfeiture in this corporation."

The foregoing by-law was regularly adopted by the plaintiff Grain Company at a meeting of the stockholders, at which meeting defendant was present, and assented to the adoption of this by-law. While the by-law in question was in full force and effect, the defendant sold and delivered about 3,500 bushels of wheat to a competitor of the plaintiff in the town of Wray.

Under the by-law above quoted the plaintiff below claims the right to recover from the defendant the sum of \$35 on account of his having sold 3,500 bushels of grain to plaintiff's competitor in Wray, the by-law providing that a stockholder selling to such competitor shall pay to the Grain Company "the sum of one cent per bushel for each bushel of grain so sold."

It was contended by the defendant in the trial court, as it is contended here, that the by-law above quoted is invalid as being "in restraint of trade," that it "tends to stifle competition" and "is contrary to public policy." The trial court held the by-law valid, evidently upon the ground appearing in the following remark of the trial judge: "I find nothing in that contract (by-law) which is an unreasonable restraint of trade."

Both parties treat the by-law in question from the standpoint of a contract, applying to it the same tests as are applied in determining the validity of contracts. The method thus taken is undoubtedly proper. Numerous by-laws not repugnant to public policy have been upheld as reasonable, and, on the other hand, by-laws operating in restraint of trade have been held invalid. 7 R. C. L. 146, sec. 118.

The validity of the by-law in the instant case is questioned, and therefore must be determined, solely with re-

gard to whether or not it is in such restraint of trade as to be contrary to public policy.

"The question is thus reduced to the inquiry whether at common law the contract here involved is violative of any canon of public policy. In considering this question, much confusion may be avoided by marking the distinction not always observed in the adjudicated cases between those contracts which, since the earliest history of the law on the subject, have been designated as 'contracts in restraint of trade,' and those more correctly designated as 'contracts in restraint of competition.' The term 'contracts in restraint of trade' has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance as to render its use in any other connection confusing. The rules relating to such contracts are of long standing and thoroughly established."

Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522.

The law in this state as to the class of contracts last mentioned in the foregoing quotations has been announced in *Freudenthal v. Epsey*, 45 Colo. 488, 102 Pac. 280, 26 L. R. A. (N. S.) 961, and in *Barrows v. McMurtry Mfg. Co.*, 54 Colo. 432, 131 Pac. 430. If the by-law now under consideration, properly treated as a contract, is in restraint of trade in the broad sense, it does not belong to that class of contracts which was dealt with in the two Colorado cases above cited, but belongs to that class described in 2 Elliott on Contracts, 125, sec. 790, as follows:

"One class of contracts in restraint of trade consists of such as tend or are designed to destroy or stifle competition, effect a monopoly, artificially maintain prices, or by other means hamper or obstruct the course of trade as it would be carried on if left to the control of the natural law governing trade or commerce."

Both classes of contracts, when unreasonable and to the injury of the public, are alike illegal and against public

policy. The illegality of a contract or combination for the restraint of competition does not lie in the agreement not to compete, but in its reflex injury to the public. 6 R. C. L. 787, sec. 191. The rule inhibiting interference with public interests invalidates contracts the tendency of which is to lessen competition. 13 C. J. 480, sec. 423. In *Barrows v. McMurtry Mfg. Co.*, *supra*, it was said:

"The law looks with high disfavor upon any condition which tends to stifle the free and unimpeded course of competitive buying and selling in the open market of commodities which are necessities, and contribute to the general comfort and well being of humanity."

A restriction upon competition is not necessarily illegal, and the existence of the element of combination in no way necessarily involves the existence of an illegal restriction upon competition. Cook on Combinations, etc., sec. 135, p. 271. In *Flouring Mills v. Swanson*, *supra*, it was said:

"Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and increasing prices. Just the extent to which this may be done the courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud."

Each case in which the question of reasonableness of restraint arises must be determined according to its own particular facts. 13 C. J. 475. In Cook on Combinations, etc., sec. 133, p. 267, it is said:

"The proper answer to the further question what constitutes reasonableness may be that the restriction is reasonable and therefore not illegal if 'the public is not injured' thereby. Obviously, however, so broad and general a test is incapable of very close application, each case that arises being left to 'be decided upon its own merits' and upon the particular circumstances developed."

From the circumstances just indicated, it follows that numerous authorities may be cited and discussed in support

of the contention on either side in the instant case, with the possibility that no one of them, even if fully approved, would be decisive of the case at bar.

We find, however, that the Supreme Court of Iowa, in two cases, has decided practically the same identical question which is presented in the instant case. The first of these cases is *Reeves v. The Decorah Farmers' Co-operative Society*, 160 Iowa 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104, decided April 10, 1913. In that case the defendant society was a corporation organized for the purpose of buying, selling and shipping hogs at the town of Decorah, Iowa. There were 350 individual stockholders, composed of farmers living in the vicinity of Decorah. The corporation had a by-law, similar in its effect to the by-law involved in the instant case. The by-law there was in the following language:

"In order to insure future success and prosperity of this society, its members and shareholders are required to sell all their marketable produce and live stock to the society. Any member or stockholder who may prefer to sell his produce or live stock to a competitor in this market shall forfeit to the company and pay over to its treasurer, from the proceeds received for produce or live stock so sold to other firms or competitors, the amount as follows: Five cents for every one hundredweight sold to any competitor."

The foregoing by-law was held by the court to be invalid as being in "undue restraint of competition." The court, after citing and reviewing a number of authorities on combinations and contracts in restraint of trade and of competition, uses the following language in reaching its conclusion:

"So long as competition is regarded as the life of trade, all combinations, contracts, arrangements, or agreements made to stifle it, or which may have that effect, are regarded as unlawful, save as heretofore stated, where connected incidentally with some other contract as of purchase or sale or with contracts of employment, etc., so long as

such restraints are reasonable and just. But, where disconnected with some other contract and made enforceable by fine or penalty, we think they come within the ban of the law.

True, it is that each of the members of this association might have concluded not to sell any of his hogs to the plaintiff, and, perhaps, all might have agreed in advance not to do so. This would have been freedom of trade. But here there is freedom of trade in form, but annexed thereto is a fine or penalty for exercising such freedom. This is restraint of trade, or rather restraint of competition. That such fine or penalty made the society an illegal one is to our minds too clear for argument. Plaintiff (a competitor of the association) was placed at a disadvantage and could not compete with the society in purchasing hogs from its members, and the members were not free to deal with plaintiff. If they dealt with him, he either forfeited his profits, by reason of having to pay too much for his hogs, or they forfeited a part of the purchase price as a penalty for selling to another. To our minds, this was undue restraint of competition, or, as the term is now understood, 'restraint of trade.' "

The foregoing expressions of the Iowa court are each and all as fully applicable to the facts in the instant case as to the facts in the Iowa case. Here as there the combination is that of farmers, as stockholders in a corporation, agreeing in a by-law not to sell their products to a competitor of their company in the town where it does business. In both cases the by-law imposes a penalty for its violation.

Under the admitted facts in the instant case, the corporation "has paid dividends to its stockholders each year since its organization," while in the Iowa case the testimony was that the society "was formed primarily as a selling agency," and that there "was no purpose to distribute a dividend." From this it appears that the by-law in the instant case is less necessary as a fair protection to the stockholders than

it was in the Iowa case, and therefore the restraint would be unreasonable in a greater degree than it was in that case.

We need not assume that the stockholders of The Wray Farmers' Grain Company deliberately entered into a scheme or combination, by means of this by-law, for the purpose of preventing any other grain buyer from doing business in Wray. The by-law would be invalid without proof of this intent. Neither is it necessary to find that competition has actually been stifled. In *Anderson v. Shawnee Compress Co.*, 17 Okla. 231, 87 Pac. 315, 15 L. R. A. 846, it is said:

"Nor, in order to vitiate a contract, is it essential that its results should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages derived from free competition."

From the agreed statement of facts filed in this case the tendency of the by-law to stifle competition is manifest. It is practically impossible for a competitor of the plaintiff company in Wray to secure the patronage of the 230 existing stockholders in the Grain Company. The number of such stockholders may increase, since there are 400 shares of capital stock. Such stockholders may comprise all or nearly all of the farmers residing in the vicinity of Wray. If these farmers do not want to sell grain to their own company, they are allowed to sell to any competitor outside of Wray, but not to any competitor in Wray, unless they pay the penalty of one cent per bushel for each bushel of grain so sold in Wray. It follows that they will not sell to a competitor in Wray unless they receive one cent or more per bushel more than what is offered by their own company. The competitor must offer this additional amount or else lose the business. The by-law, if enforced, unquestionably would tend to drive out of business any other grain buyer in Wray and give the plaintiff company a monopoly. This effect renders the by-law unreasonable.

There is another feature of the by-law which makes it unreasonable. That is its restriction upon the stockholders

themselves. They are restricted in their right to sell their product to whomsoever they please, and there is an absence of circumstances which renders such restriction fairly necessary for their own protection. According to the by-law, they are required to sell to no grain buyer in Wray, which is their nearest and most convenient place of market, except to The Wray Farmers' Grain Company. If they violate this agreement they are subject to the penalty prescribed in the by-law.

The unreasonableness in the two respects above noted is due to the resulting injury to the public, which injury is assumed to exist or be inflicted under circumstances of this kind according to the well settled doctrines having to do with public policy. Our conclusion in this case, as well as the conclusion of the Iowa court, is amply supported by numerous adjudications upon contracts surrounded by facts somewhat analogous to those existing in the case at bar.

In the case of *People v. Chicago Live Stock Exchange*, 170 Ill. 556, 48 N. E. 1062, 39 L. R. A. 373, 62 Am. St. Rep. 404, the court held invalid a by-law of the Chicago Live Stock Exchange which prohibits members from employing trade solicitors not members of the association and which limits the number of solicitors which may be employed by members in certain states. In that case the court said:

"Combinations and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business, employing such means and agencies as are not prohibited by law. The natural flow of trade and commerce must be unrestricted, and men engaged therein may accelerate its current by all means not unlawful. * * * Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions and in violation of law. * * * Attempts to place restrictions on trade and commerce and to fetter individual liberty of

action by preventing competition are hostile to public welfare and affect the interests of the people."

In 19 R. C. L. 36, sec. 20, it is said:

"Every contract, combination or arrangement whose direct purpose, probable effect, or necessary tendency is to stifle or unduly to restrict competition is unlawful, at common law and by statute."

Among cases more or less supporting the Iowa cases herein discussed may be cited the following: *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184; *United States v. Addyston Pipe, etc., Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390; *Arnold v. Jones*, 152 Ala. 501, 44 So. 662, 12 L. R. A. (N. S.) 150; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341.

The doctrine or ruling of *Reeves v. Decorah Farmers' Cooperative Society*, *supra*, the Iowa case above discussed was reaffirmed in *Ludowese v. Farmers' Mutual Cooperative Company*, 164 Iowa 197, 145 N. W. 475. In the latter case the by-law imposed a penalty upon the stockholder if he sold grain or live stock to a competitor of his company, the penalty as to grain being one cent per bushel, as in the case at bar. The court held that "the by-law was clearly in restraint of competition and therefore illegal." It further announced that it adheres to its decision in the Reeves case.

The decision in these Iowa cases is criticised by the defendant in error, the plaintiff below, on the ground that the Iowa court "did not consider the proposition as to whether the by-law was a reasonable or unreasonable restraint of trade." True, there is no direct expression upon this point. Nevertheless, the doctrine as to reasonableness was in the mind of the court, and regarded as a settled proposition, since the court in one part of the opinion uses this language:

"Again, the doctrine of restraint as applied to the early

cases has been broadened, and all contracts in unreasonable restraint of competition are now understood to be in restraint of trade."

In our opinion the decisions in the Iowa cases above cited are sound, and for the reasons above indicated we hold the by-law involved in the instant case void and illegal as being in undue restraint of competition. The cause is therefore reversed and remanded with directions to dismiss the case.

Reversed.

Decision *en banc*.

No. 9247.

MESSER v. THE PEOPLE.

1. APPEAL AND ERROR—*Objections to Evidence*, must be made at the trial. First presented in the motion for a new trial they will be disregarded.
2. — *Bill of Exceptions*. Rulings in the admission or exclusion of evidence, must, to avail the defeated party, be excepted to at the time, and preserved in a bill of exceptions.
3. — *Harmless Error*. Will be disregarded.

Error to Teller District Court, Hon. J. E. Little, Judge.

Messrs. ALTER & UPTON, for plaintiff in error.

Hon. LESLIE E. HUBBARD, attorney general, and Mr. CHARLES ROACH and Miss CLARA RUTH MOZZOR, assistant attorneys general, for The People.

Opinion by Mr. Justice Allen:

THE defendant below was convicted of larceny, and brings error. The assignments of error, which are argued, relate chiefly to the admission or exclusion of evidence.

A part of the evidence admitted, which is now complained of, was admitted without any objection being made to its introduction at the time of the trial, but objections to which were, for the first time, made in a motion for a new trial.

It is a well settled rule that objections to the admission or to the exclusion of evidence at the trial will not be reviewed on appeal or writ of error unless made at the trial. *Epley v. People*, 51 Colo. 501, 119 Pac. 153; 12 Cyc. 812, citing *Mora v. People*, 19 Colo. 255, 35 Pac. 179, and other cases. Such objections come too late when made, for the first time, on a motion for new trial. 8 Enc. of Pl. & Pr. 217.

Other evidence, discussed in the briefs, was admitted or excluded over the objections of defendant, and the trial court's rulings in such instances are assigned as error. The record shows, however, that no exceptions to such rulings were taken during the trial. In *Kan. Pac. Ry. Co. v. Twombly*, 2 Colo. 559, it was said:

"Therefore, to entitle the defeated party to a review in this court, of errors committed upon the trial, an exception must be reserved at the time, and brought into the record by bill of exceptions, settled and sealed, either at the time of the trial, or afterward, and within a day allowed for that purpose, under the statute, and while the court below may, in its discretion, award a new trial for errors to which no exception was taken or preserved, yet, if it refuse to do so, an exception to the denial of the motion will not suffice to present the matter for review in this court."

The above case was cited by this court in *Holland v. People*, 30 Colo. 94, 69 Pac. 519, where it was held that: "Unless an exception to the ruling of a court on an objection to the introduction of testimony is taken and preserved, alleged errors based thereon will be considered waived."

The same rule applies to rulings excluding evidence. 12 Cyc. 818. If no exception is taken to the exclusion of offered evidence, the ruling can not be assigned as error. 8 Enc. of Pl. & Pr. 238. The plaintiff in error calls our attention to the language used in *Tashima v. People*, 58 Colo. 98, 144 Pac. 200, wherein the court, while following the rule, intimated that under certain circumstances the foregoing rule would not be adhered to. In the instant case, however, no sufficient reason has been shown for a departure from it.

The defendant complains of the conduct of the District Attorney in asking one of the people's witnesses whether or not she was an unwilling witness. Whether or not such conduct was improper need not be considered for the reason that the conduct in question was not objected to at the trial. *Torris v. People*, 19 Colo. 438, 36 Pac. 153; 12 Cyc. 814.

Complaint is also made of the court's requiring the defendant's counsel to testify. No exception was saved to such ruling. Furthermore, the witness did not testify to any fact which was prejudicial to defendant, but on the other hand the testimony was entirely in defendant's favor. The error, if any was committed, was harmless, and did not tend to prejudice the substantial rights of the defendant on the merits. For this reason it does not warrant a reversal. Sec. 1986 R. S. 1908; 4 C. J. 960.

The above disposes of all of the assignments of error that are argued, and for the reasons hereinbefore stated, the judgment is affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9260.

SEVILLA v. THE PEOPLE.

1. CRIMINAL LAW—*Manslaughter—Verdict*. Notwithstanding the provisions of sec. 1629 of the Revised Statutes, the court presiding in the trial of the alleged homicide may exclude from the jury the question of involuntary manslaughter, where there is no evidence of that degree of the crime or the defense is upon a theory having no relation thereto.

The question is solely for the court.

2. INSTRUCTIONS—*Not Requested*, failure to give is not error.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Mr. GEO. J. HUMBERT, for plaintiff in error.

Hon. LESLIE E. HUBBARD, attorney general; Mr. CHARLES ROACH and Miss CLARA RUTH MOZZOR, assistant attorneys general, for The People.

Opinion by Mr. Justice Allen:

THE defendant below was convicted of the crime of voluntary manslaughter, and brings error.

The information charged murder in the first degree. The trial court, after giving instructions as to the degrees of murder, defined and instructed upon manslaughter, and advised the jury that so much of the definition of manslaughter "as refers to involuntary manslaughter is not to be considered by the jury for any purpose." The defendant contends that it was error for the trial court to advise the jury to disregard, and fail to instruct upon, the question of involuntary manslaughter. The theory of his counsel is that since the court submitted the question of manslaughter to the jury, it should have allowed the jury to designate, if they found the defendant guilty of manslaughter, whether it was voluntary or involuntary. In this connection the defendant relies upon section 1629 R. S. 1908, sec. 1758 Mills Ann. Sts. 1912, which provides that: "Whenever a jury shall find a person guilty of manslaughter, they shall designate by their verdict whether it be voluntary or involuntary manslaughter."

The statute, however, does not deprive a court of its right to withdraw from a jury the consideration of the defendant's guilt of that degree of the offense charged upon which there is no evidence. *State v. Spivey*, 151 N. C. 676, 65 S. E. 995, 1000; *Williams v. State*, 12 Okla. Cr. 39, 151 Pac. 900.

"It is well settled that in a prosecution for murder where there is no evidence from which a jury would be justified in finding the defendant guilty of manslaughter, a trial judge is not required to instruct upon that grade of homicide." *Demato v. People*, 49 Colo. 147, 111 Pac. 703, Ann. Cas. 1912A 783, 35 L. R. A. (N. S.) 621, citing *Mow v.*

People, 31 Colo. 351, 72 Pac. 1069; *Crawford v. People*, 12 Colo. 290, 20 Pac. 769; *Carpenter v. People*, 31 Colo. 284, 72 Pac. 1072.

From the foregoing rule it would seem to follow naturally that where there is no evidence tending to prove involuntary manslaughter, an instruction upon that grade of homicide is properly omitted. Such is the law in those jurisdictions where the point has been determined. In 21 Cyc. 1075 it is said:

"The refusal or neglect to instruct the jury as to involuntary manslaughter or negligent homicide is not error where there is no evidence of such a description of killing, as in cases where it clearly appears that the killing was intentional, or that for any other reason it was either murder or voluntary manslaughter or nothing."

It was for the court, and not the jury, to determine whether there was any evidence tending to prove involuntary manslaughter. In *Smith v. People*, 1 Colo. 121, 146, the court expressed the law on this point by the statement that: "Whether there is any evidence at all to prove a fact charged is always a question for the court, but the sufficiency of evidence to prove the facts charged must be determined by the jury."

The record in the instant case shows that there was no evidence whatever tending to prove involuntary manslaughter. The testimony on the part of the prosecution tended to prove murder. The deceased was killed by the defendant in a saloon. The homicide was committed by means of shooting with a revolver. There was testimony that the defendant came into the saloon, and found the deceased already there; that no conversation or quarrel took place between the parties; and that the defendant immediately after entering the saloon began firing at the deceased and killed him. The only defense that the testimony introduced in behalf of the accused tended to establish was that of self-defense. Some of the defendant's witnesses testified that the deceased fired the first shot. That a verdict of acquittal

was not sought on any other ground than that the defendant acted in self-defense is borne out by the following statement made by counsel for defendant in his brief:

"We wish to state right here that the plaintiff in error (defendant below) admits that he fired the shot that killed Enrico, but that he did so in self-defense and in order to save his own life."

In the language of the court in *Hunter v. Comm.*, 171 Ky. 438, 188 S. W. 472, "the whole defense was predicated on a theory having no relation to the law of involuntary manslaughter."

The facts in the instant case are analogous to those in *Clements v. State*, 141 Ga. 667, 81 S. E. 1117, where the court said:

"The defendant did not make a statement on the trial of the case, but introduced testimony to the effect that the deceased first fired upon him and he shot the deceased in self-defense. Under no view of the case was the law of involuntary manslaughter applicable to the evidence, and the court properly omitted any instruction on that grade of homicide."

There being no evidence introduced on either side tending to disclose a case of involuntary manslaughter, the trial court was right in refusing to instruct upon that degree of the offense. No error was committed, in view of the authorities cited herein and under the rule above mentioned, which is also announced in *Wharton on Homicide* (3rd Ed.) 264, as follows:

"So, failure to instruct as to involuntary manslaughter in a prosecution for homicide is not error when neither the evidence nor the statement of the accused authorizes or requires such a charge."

Even if the evidence justified an instruction upon involuntary manslaughter, failure to give such instruction would not constitute reversible error in this case, for the reason that no instruction upon that point was requested, and the instruction which was limited to voluntary man-

slaughter was not objected to. *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *Ray v. People*, — Colo. —, 167 Pac. 954; *Clarke v. People*, — Colo. —, 171 Pac. 69, 72.

The plaintiff in error complains of what he terms an "instruction or address given by the trial judge to the jury after the jury had been deliberating for twenty hours without reaching a decision." The remarks of the trial judge, on the occasion here referred to, were as follows:

"Gentlemen of the jury: It appearing to the court at this time that there is no misunderstanding or disagreement among you as to the law of this case or the interpretation of the instructions; that your deliberations have already been unusually prolonged without an agreement being reached; I deem it necessary to the administration of justice that this further instruction relative to your duties as jurors now be given:

You should consider that this case must at some time be decided; that you have been selected in the same manner and from the same source as any future jury must be; that there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial or that more competent to decide it, or more or clearer evidence will be produced on the one side or the other; that in order to bring twelve minds to an unanimous conclusion, you must examine the question submitted to you with candor and a proper regard and deference to the opinions of each other; that you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's argument.

If a majority of your number are for conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest and intelligent with himself, who under the sanction of the same oath have heard the same evidence, with the same attention and an equal desire to arrive at the truth.

On the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment from which so many of their number dissent, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

And whilst at least each juror must act upon his own judgment concerning the evidence in the case, and not upon the judgment of his fellows, it is your duty, guided by the foregoing and by all of the instructions heretofore given in this case to decide the case if you can conscientiously do so.

It is accordingly ordered by the court that you be returned to your jury room for further deliberation."

Counsel for plaintiff in error states in his brief that at the time these remarks were made by the trial judge counsel for the defendant was not present. The record indicates otherwise, and has not been corrected if erroneous. It therefore imports absolute verity under the rule recently announced by this court in *Smith v. People*, No. 9082, — Colo. —, 170 Pac. 959. Even if the attorney for the accused was absent at the time, and that fact appeared of record, no cause for reversal would result, since the communication of the trial judge to the jury on that occasion in no manner related to matters which the jury must consider in determining their verdict, and nothing was said which could have influenced the verdict in the least degree. *Rolland v. People*, 30 Colo. 94, 69 Pac. 519. The trial court's remarks did not constitute an instruction, but were merely equivalent to urging agreement, and nothing is contained in the remarks which is prejudicial to the defendant. *Hutchins v. Haffner*, — Colo. —, 167 Pac. 966, 968; *Comm. v. Tuey*, 62 Mass (8 Cush.) 1. Cases sustaining similar remarks urging agreement in criminal cases are collected in 12 Cyc. 682; 16 C. J. 1091, sec. 2562.

We find no error in the record, and the judgment is therefore affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9328.

LECKENBY ET AL. v. THE POST PRINTING AND PUBLISHING
COMPANY ET AL.

1. SALARY OF PUBLIC OFFICER—*Unlawful Increase*. The Constitution provides that the salary of the Lieutenant Governor shall not be increased during his official term. The officer keeping no books, records, or office, and having no duties to perform except to preside at the meetings of the Senate, *held* that an appropriation made by the Legislature to this officer, "for official or semi-official purposes", was void.
2. — *Mileage to Public Officer*. No official of the state except members of the Legislature, and no county officials, except the county commissioners, are entitled to an allowance for traveling expenses.
3. APPROPRIATIONS—*Must be pursuant to law*. The compensation of a public officer must be prescribed by statute before it can be included in the general appropriation bill. So the expenses of a public officer must be the subject of an express statutory allowance, before an appropriation can be made therefor.
4. ILLEGAL APPROPRIATION—*Injunction*. A taxpayer may sue to restrain the payment of money under an appropriation made by the General Assembly in violation of the Constitution; and the District Court may award the injunction.
5. CUSTOM—*Unlawful allowance to a public officer*, is not justified or excused by a custom to make such allowance to his predecessors.

*Error to Denver District Court, Hon. Charles C. Butler,
Judge.*

Mr. T. J. O'DONNELL, Mr. CANTON O'DONNELL, for plaintiffs in error.

Mr. JOHN A. RUSH, Mr. FOSTER CLINE, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court:

This is an action in equity, by an individual taxpayer, to restrain the State Auditor and State Treasurer from paying out money from the State Treasury to the Lieutenant-Governor upon an appropriation made by the Legislature.

At the time of the matters complained of herein, plaintiff in error, James L. Pulliam, was Lieutenant Gov-

ernor of Colorado, Charles H. Leckenby was State Auditor, and Robert H. Higgins was State Treasurer. Pulliam, as ex-officio president of the Senate, presided over the Senate of the 21st General Assembly in 1917. The Legislature at this session appropriated for the *per diem* of its officers, and to pay the members and employees thereof the total sum of \$215,000, and for printing and other miscellaneous expenses, the sum of \$38,000, and for the salary of Pulliam as Lieutenant Governor, \$2,000 for the biennial period of 1917 and 1918. In addition to these appropriations there was included in the General-Short appropriation bill the following item: "Lieutenant Governor's incidental and office expenses, for official or semi-official purposes to be determined by him, \$166.66." And in the General-Long appropriation bill this item: "Lieutenant Governor's fund for official or semi-official purposes to be determined by him for the biennial period, \$1,000, less amounts already paid from the Short appropriation."

The present suit was brought by a taxpayer to have this appropriation adjudged void, and the prayer of the complaint is for a temporary writ, to be made permanent on final hearing, enjoining the payment of this \$1,000.

Demurrers to the complaint upon the ground that plaintiff has no capacity to maintain the suit, and that the complaint does not state facts sufficient to constitute a cause of action were overruled, and defendants elected to stand thereon.

Thereupon, judgment was entered for plaintiff in accordance with the prayer of the complaint, and the state officers were restrained from issuing or paying any warrant to Pulliam, under and pursuant to that clause in the appropriation bill which reads: "Lieutenant Governor's fund for official or semi-official purposes to be determined by him for the biennial period, \$1,000."

The Constitution provides that:
Art. 4, sec. 1:

The Lieutenant Governor shall hold his office for the term of two years, and shall perform such duties as are prescribed by the Constitution, or by law.

Art. 4, sec. 14:

The Lieutenant Governor shall be president of the Senate, and shall vote only when the Senate is equally divided.

Art. 4, sec. 13:

In case of the death or disability of the Governor, the powers, duties, and emoluments of the office of Governor shall devolve upon the Lieutenant Governor.

Art. 4, sec. 19:

The Lieutenant Governor shall receive for his services a salary to be established by law, which shall not be increased or diminished during his official term.

Art. 5, sec. 27:

The General Assembly shall prescribe by law the compensation of the officers and employees of each House.

Art. 5, sec. 28:

No bill shall be passed providing for the payment of any claim against the state without previous authority by law, or giving extra compensation to any public officer after services shall have been rendered.

Art. 5, sec. 30:

Except as otherwise provided by the Constitution, no law shall increase or diminish the salary or emoluments of any public officer after his election or appointment.

Art. 5, sec. 9:

No member of either House shall receive any increase of salary or mileage under any law passed during the term for which he may have been elected.

Art 5, sec. 34:

No appropriation shall be made for charitable or beneficial purposes to any person.

Art. 5, sec. 33:

No money shall be paid out of the Treasury, except upon appropriations made by law.

Art. 5, sec. 32:

The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the state, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

The Statutes provide that:

S. L. (1883), sec. 1, p. 191:

The Lieutenant Governor shall receive an annual salary of \$1,000.

R. S. (1908), sec. 6153:

Whenever the powers and duties of the office of Governor shall devolve upon the Lieutenant Governor, the salary of the Governor shall cease, and the same shall be received by the Lieutenant Governor as a full compensation for his services.

S. L. (1909), p. 314:

Each member of the General Assembly shall receive \$1,000 as compensation for his services for each biennial period, and all actual and necessary traveling expenses, and the members of the General Assembly shall receive no other compensation, perquisite, or allowance whatever.

Garrigues, J., after stating the case as above:

1. The only public duty of the Lieutenant Governor, when the Legislature is in session, is to preside over the Senate, for which services he is entitled to a salary of \$1,000 per annum, or \$2,000 for the biennial period. He has no public duty to perform during the intermission between sessions. The extra \$1,000 allowed in the appropriation could not have been for his compensation because that was already provided for in the bill, and if it was intended as an increase in salary, it was unconstitutional.

2. The claim is made that it was for his expenses. But what expenses? He has no office, books, records, or papers to keep or care for. In his official capacity as Lieutenant Governor, he has no acts to perform for the public, except to go to the Capitol, preside over the Senate, and return

home, and when it adjourns *sine die*, his duties with the public service cease. He has no expenses which are made a charge against the state. While the Legislature is in session, an office is furnished him free at the Capitol, and the appropriation of \$38,000 to pay for printing, stationery, stamps, supplies, and miscellaneous expenses, include him while presiding over the Senate, with the officers and members of the Legislature; and when acting as Governor, he is entitled to the pay and emoluments of the Governor. As Lieutenant Governor, he has no official or semi-official duties to perform other than to preside over the Senate.

3. But it is said the appropriation may have been intended for mileage, and that the court cannot question the intent of the Legislature. There is no law authorizing him to take mileage. Mileage of the Lieutenant Governor is not made a charge against the state. He is allowed no mileage. If he could take mileage, then all the state officials could as well take mileage. He is required to come to the Capitol and return home at his own expense, and if the state pays his traveling expenses, it is an increase in his compensation. No state officials except members of the Legislature, and no county officials except county commissioners, are entitled to take mileage.

Any public officer demanding mileage, emoluments, fees, costs, or expenses, must point out some statute authorizing its allowance.

Denver v. Meyer, 54 Colo. 96, 129 Pac. 197; *McGovern v. Denver*, 54 Colo. 411, 131 Pac. 273; *Board of County Commissioners v. Lee*, 3 Colo. App. 177, 32 Pac. 841; *Fremont Co. v. Wilson*, 3 Colo. App. 492, 34 Pac. 265; *Stevens v. Sedgwick Co.*, 5 Colo. App. 116, 37 Pac. 948; *Troup v. Morgan Co.*, 109 Ala. 162, 19 South. 503; *Yeager v. Com.*, 95 Ind. 427; *Wood v. Com.* 125 Ind. 270, 25 N. E. 188; *Legler v. Paine*, 147 Ind. 181, 45 N. E. 604; *Board of County Commissioners v. Buchanan*, 21 Ind. App. 178, 51 N. E. 939; *State v. Wofford*, 116 Mo. 220, 22 S. W. 486; *State v. Brown*, 146 Mo. 401, 47 S. W. 504; *Bates v. City*, 153 Mo.

18, 54 S. W. 439, 77 Am. St. Rep. 701; *State v. Adams*, 172 Mo. 1, 72 S. W. 655; *State v. Silver*, 9 Neb. 85, 2 N. W. 215; *Bayha v. Webster Co.*, 18 Neb. 131, 24 N. W. 457; *Red Willow Co. v. Smith*, 67 Neb. 213, 93 N. W. 151; *Hall v. Hamilton*, 74 Ill. 437; *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120; *State v. Cheetham*, 21 Wash. 437, 58 Pac. 771; *Torbert v. Hale Co.*, 131 Ala. 143, 30 South, 453; *Jefferson Co. v. Waters*, 114 Ky. 48, 70 S. W. 40; *State v. Raine*, 49 Ohio St. 580, 31 N. E. 741.

Mileage or traveling expenses paid to the Lieutenant Governor would clearly come within the term "compensation," because, unless the state paid it, he would have to pay it himself. Therefore, if intended to cover mileage, it would be an increase in his compensation, and unconstitutional.

4. The general appropriation bill can only provide for meeting charges already created against the public funds by affirmative acts of the Legislature. The compensation of Lieutenant Governor should first be prescribed by affirmative legislation before it can be included in the general appropriation bill, and there must be a law permitting expenses to be incurred before they can lawfully be paid out from the State Treasury. A law must be enacted providing for its allowance before the compensation or expenses of state officials can be included in the general appropriation bill.

People, ex rel. v. Spruance, 8 Colo. 307, 6 Pac. 831; *In re Appropriations*, 13 Colo. 316, 22 Pac. 464; *Lithographing Co. v. Henderson*, 18 Colo. 259, 32 Pac. 417; *In re House Bill*, 21 Colo. 46, 39 Pac. 1096; *Parks v. S. & S. Home*, 22 Colo. 86, 43 Pac. 542; *In re Senate Bill*, 23 Colo. 508, 48 Pac. 540.

5. We know of no contingency by which the Lieutenant Governor can lawfully take additional compensation above the \$2,000 salary allowed by law. There are no official or semi-official purposes for which he may lawfully use any part of this appropriation. It is additional compensation,

and is in violation of the Constitution and Statutes. The Constitution provides that no money shall be paid out of the State Treasury except upon appropriations made by law. No matter about the terms employed in the bill, that is immaterial, the appropriation was not made by law. The effect of it is to increase the allowance, salary or compensation of the Lieutenant Governor in violation of law, and the appropriation is void.

6. The claim is made that the District Court could not, at the suit of an individual taxpayer, interfere by injunction to restrain the State Auditor from drawing, and the State Treasurer from paying, warrants upon the appropriation. No doubt some courts have so held, but the weight of authority is to the contrary. Moreover, we are committed to a contrary doctrine in regard to municipal and county officials, and we see no legitimate distinction in state officials. State officials cannot be interfered with by the courts in the exercise of their discretion in matters of a political or executive character, but drawing and paying warrants upon an appropriation made by the Legislature is of a ministerial business or financial character, without the exercise of discretionary powers, and is not of a political or executive character. M

7. A private individual taxpayer may resort to a court of equity to restrain by injunction the misapplication of public funds from the State Treasury, or enjoin the payment of a void appropriation upon the ground that the act making the appropriation is unconstitutional.

Packard v. Board of County Com'rs, 2 Colo. 338; *Nelson v. Garfield Co.*, 6 Colo. App. 279-283, 40 Pac. 474; *Little v. Jayne*, 124 Ill. 123, 16 N. E. 374; *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327; *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120; *Terrell v. Middleton* (Tex.) 187 S. W. 367; *Ellingham v. Dye*, 178 Ind. 338, 99 N. E. 1, Ann. Cas. 1915C, 200; *Christmas v. Warfield*, 105 Md. 531, 66 Atl. 491; *State v. Pennoyer*, 26 Or. 205, 37 Pac. 906, 41 Pac. 1104, 25 L. R. A. 862; *McKinney v. Watson*, 74 Or. 220,

145 Pac. 266; *Snyder v. Foster*, 77 Iowa 638, 42 N. W. 506; *Goetzman v. Whitaker*, 81 Iowa 527, 46 N. W. 1058; *Crawford v. Gilchrist*, 64 Fla. 41, 59 South. 963, Ann. Cas. 1914B, 916; *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162; *Hailey v. Huston*, 25 Idaho 165, 136 Pac. 212; *Mott v. Penn. R. R. Co.*, 30 Pa. 9, 72 Am. Dec. 664; *State v. Raine*, 49 Ohio St. 580, 31 N. E. 741.

8. Because the Lieutenant Governor is underpaid, and it has always been the custom to make such an allowance to the preceding Lieutenant Governors of this State, is no warrant for the present act. A wrong cannot be transformed into a virtue or sanctioned by age and acquiescence. A power may be long exercised in violation of the Constitution, but this does not authorize its infraction.

Judgment affirmed.

Decision *en banc*.

No. 9358.

MYERS v. THE PEOPLE.

1. WORDS—*Month*, is always taken to refer to the current year unless the contrary appears from the connection.
The rule applies even in the trial of one accused of crime.
2. CRIMINAL LAW—*Evidence of Other Crimes*, committed about the time of the offense charged, and of similar character, is admissible upon the question of intent.
The evidence examined and held sufficient to warrant the reference thereto, in the charge, as "evidence of other crimes".
3. — *Sentence*, construed in connection with remarks of the presiding Judge as not involving the punishment of the accused for an offense not charged.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Mr. LOUIS WAGNER, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General; Mr. RALPH E. C. KERWIN, Miss CLARA RUTH MOZZER, Assistant Attorneys General, for The People.

Opinion by Mr. Justice Allen:

The plaintiff in error was convicted of the crime of larceny. He asks for a reversal upon three grounds, each of which is hereinafter considered.

The first contention made is that there is no proof of the year of the commission of the offense charged. Relevant to the question thus raised, the record shows the following facts:

The information alleges that the defendant "on the 9th day of October, 1917, at (etc.) * * * of the goods, chattels and personal property of Thayer Layton, one bicycle of the value of \$42, did feloniously steal," etc. Thayer Layton testified that his bicycle was stolen "about October 3rd or 4th" and that he purchased the machine on "the 24th of September." He identified Peoples Exhibit A as the frame of his bicycle that had been stolen at the time mentioned. Counsel for the defendant in cross-examining this witness did not inquire as to the year, but did ask the witness "what day" in September he brought the wheel. The witness Dillon identified People's Exhibit A as the frame of the bicycle which he sold to Layton "on the ninth month, 24th day." He later named the month as September.

The trial took place on November 27, 1917, which was less than two months after the date of the offense as named in the information. The testimony fairly shows that when the month of October was referred to, it was October of the current year, 1917, that was meant. This is indicated by the form of certain questions propounded to witnesses.

The witness Dillon was asked: "Did you have any business transaction with him (Layton) recently, along in September?" His answer was in the affirmative and related to the sale of the bicycle which was afterwards stolen from Layton. The examination of Officer Baker was begun by the question: "Your name and occupation in October of this year, and since?" Officer Wendling's testimony followed the question: "Your name and position on

the ninth of last month, this year?" Officer Gilmer was asked: "Your occupation during October of this year?" The witness Printy was asked: "Where did you live on the ninth of October last?" There can be no doubt that the expression "this year" was understood by both the prosecution and the defendant to refer to the current year, 1917, and that when the witness testified as to matters occurring in the month of October, and when they spoke of "October," the year understood and meant was 1917. In *Tillson v. Dowley*, 8 Greenl. (Me.) 163, speaking of certain testimony, it is said: "When a month is referred to, it will be understood to be of the current year, unless, from the connection it is apparent that another is intended." This rule has been approved in a homicide case, *Tipton v. State*, 119 Ga. 305, 46 S. E. 436, and is applicable in the instant case. The time of the offense may be established by circumstantial evidence. 16 C. J. 771. Under the facts appearing in this case, the failure of the witnesses expressly to name the year when testifying as to the day and month of the occurrences described is not a fatal defect, and did not vitiate the verdict.

The second contention made by the plaintiff in error, defendant below, is that the court erred in the admission of certain testimony which is referred to in the argument as "evidence of other offenses." Bearing upon this contention, the following circumstances are shown by the record:

The witness Printy testified that between eight and nine o'clock in the evening the defendant came to his shop and stated that he had bicycle frames, remarking also, "the funny part of it is they are in a stolen automobile." The automobile was driven to the back part of the shop where the defendant and another person proceeded to unload the frames. While the automobile was still at the back of the shop, and before all the frames were unloaded, it was discovered by Officer Gilmer. According to the printed abstract, this officer found fourteen bicycle frames in the lot, one of which was the frame of the bicycle for the theft of

which defendant was tried. The evidence which is the subject of the contention that "evidence of other offenses" was received, consists of the frames found in the automobile, and the testimony of various witnesses who identified the frames as their own, and testified that their respective bicycles, to which the frames belonged, were stolen in the same city, and about the same time as that relating to the commission of the larceny charged in the information.

The testimony, although tending to prove other offenses, was admissible on the ground and the theory thus stated by the trial court at the time of its admission:

"I understand the purpose of this testimony that is now offered, is for the purpose of showing a system or motive or intent to commit the crime charged in the information? * * * For that purpose, and that purpose only, you may bring these frames and have them identified."

In the instructions to the jury, the court said:

"There is some evidence with reference to other transactions than that charged in the information. The evidence is admissible only as bearing upon the question of whether or not the defendant had a plan or design to produce a result, of which the act charged in the information was a part, and you can consider such evidence for no other purpose."

Under the circumstances appearing in the record, this testimony, taken in connection with the court's ruling and instruction thereon, fully meets the tests which are applied in determining whether evidence tending to establish other crimes is admissible. *Housh v. People*, 24 Colo. 262, 50 Pac. 1036; *Elliott v. People*, 56 Colo. 236, 138 Pac. 239. In 17 R. C. L. 76, sec. 80, the law upon this point is summarized as follows:

"In cases of larceny, if properly connected, the proof that other stolen property was found in the possession of the defendant with the property charged to have been stolen is admissible for any of four purposes: (1) to prove felonious intent; (2) to prove that the alleged theft was a part

of a continuous transaction or scheme of larceny; (3) to identify the defendant; (4) to identify the stolen property. In all of these cases, however, it must not only be shown that the defendant was found in possession of the property, and that it was stolen; but, in addition thereto, it must appear from the proof that there was some connection between it and the property charged in the indictment to have been stolen. If nothing be shown but that it was in the defendant's possession, then it is inadmissible in every case, because it tends to prove nothing but another and a separate and independent larceny. If, in addition to the fact that the stolen property was found in the possession of the defendant soon after the alleged larceny, it be shown that it had been stolen at or about the same time and place as that charged to have been stolen, then it is admissible in all of the cases, because, under the circumstances of each case, it tends to prove the matter in controversy."

The third and last contention of the plaintiff in error is that the judgment is erroneous because, as it is alleged in an assignment of error, "the court erred in including as part of its judgment, punishment for crimes for which defendant was not on trial."

The statement thus made in the assignment is not borne out by the record. The court sentenced the defendant to a term of not less than two and a half years and not more than two years and eight months in the penitentiary, and then remarked:

"In view of the circumstances in this case, and the number of bicycles that you have taken from different people in the City and County of Denver, shown by the evidence in this case, in the opinion of the court, this is a very light sentence."

These remarks do not indicate that the court included in the sentence a punishment for the theft of other bicycles than that charged in the information; neither do they show that the sentence was influenced by the evidence of other

offenses. There is nothing in the record showing an abuse of discretion in fixing the punishment, and even if the court in the exercise of its discretion took into consideration the evidence which tended to show that this was not the defendant's only offense, this would not render the judgment illegal. 16 C. J. 1363, sec. 3210. It is not uncommon for courts in pronouncing judgment to take into consideration the habits of the defendant, whether or not his conviction is for a first offense, or whether or not he is a habitual criminal. Such circumstances surrounding the defendant, if within the knowledge of the court in any way, may properly be taken into consideration in the exercise of discretion within the statute in determining the measure of punishment that should be imposed. The appellate courts do not set judgments aside for such reason.

No error appearing in the record, the judgment is affirmed.

Affirmed.

Decision *en banc*.

Mr. Justice Teller and Mr. Justice White dissent.

Mr. Justice White dissenting:

I think the Court is in error in holding that the admission of evidence, tending to establish the commission of crimes other than the one charged against defendant in the information, was proper and not prejudicial to him. The quotation from 17 R. C. L., cited in the opinion, properly states the law, but the facts of this case exclude its application herein. On the contrary, that rule of law shows conclusively that the evidence in question was not only inadmissible, but highly prejudicial to defendant. It may be conceded that "the other property" found in the possession of defendant was stolen, but it does not appear from the proof that there was any connection between it and the property described in the information. Furthermore, the record does not show that the other property was stolen at about the same time and place as that charged in the information. On the contrary, it shows the following, viz.;

that the property described in the information was taken at 16th and Wazee streets, in front of the Sugar Building, about October 3d or 4th, 1917; that the wheel of Otis C. Rubidge was taken from "in front of Barnes Business College the night of September 19th," no year designated; that the bicycle of Earl McAndrews was taken "about in August," no year or place shown; that the wheel of Edward Cornwell was taken "October, I think it was the 17th or 18th," no year or place disclosed; that the bicycle of Ellis Baskin was stolen "in the early part of October, at 18th and Lincoln" streets, no year given; that the bicycle of Guy E. Bruenert was stolen "along about October, (no year given), from the side of the store at 17th and Larimer streets."

No. 9384.

SLOAN v. THE PEOPLE.

CRIMINAL LAW—*Burglary of Dwelling—Ownership.* Under Rev. Stat. 1675 breaking into an unoccupied house is burglary. The ownership is properly laid in an agent having general charge and control of the premises.

Error to Denver District Court, Hon. Julian H. Moore, Judge.

Mr. JOEL E. STONE, and Mr. WILLIAM H. GABBERT, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. CHARLES ROACH, Deputy Attorney General, and Mr. J. W. KELLEY, for The People.

Opinion by Mr. Justice Allen.

The plaintiff in error was convicted of the crime of burglary of a dwelling house. It is contended by his counsel that there is a fatal variance between the allegation in the information, and the proof adduced at the trial with respect to the ownership of the house. This contention

arises from, and is based upon, the following facts. The information describes the building burglarized as "the dwelling house of W. W. Watson." The evidence was that at the time of the alleged offense the "owner," meaning the person having the fee title to the premises, was one Charles C. Harrison, a non-resident. The house was unoccupied, but was in the possession, management, and control of W. W. Watson whose name is used in the information as that of the owner. Watson was the agent of Harrison in the sale, renting, and care of the building.

The trial court held that under the foregoing facts the ownership of the dwelling house was properly laid, in the information, in Watson, and that therefore there was no variance between the ownership pleaded and proven. The correctness of this ruling presents the first question for our determination.

Under our statute, burglary includes the breaking and entering into of unoccupied as well as of occupied dwelling houses, thus making it an offense against property and not merely against the habitation. 9 C. J. 1009.

Allegations as to ownership in burglary cases might, on this account, be placed on the same footing as such averments in charges of larceny. In an information charging larceny the ownership of the goods stolen may be laid in the person in whose possession the property was at the time of the theft, although such person is merely an agent and not the real owner. 17 R. C. L. 61, sec. 66. The reason for such rule in larceny cases is thus stated in 25 Cyc. 89;

"The actual condition of the legal title is immaterial to the thief; so far as he is concerned, one may be taken as the owner who was in peaceable possession of it, and whose possession was unlawfully disturbed by the taking."

Practically in the same language could be stated a reason for applying the same rule to averments of ownership in an information charging burglary. In Maxwell's Criminal Procedure, 104, 105, the author says:

"The object is to describe the place where the offense was committed, not to determine the ownership of the property. Ownership as against the burglar means any possession which is rightful."

From the foregoing it would seem to follow that the possession which is equivalent to ownership for the purpose of proving the offense in this class of cases need not be a possession coupled with actual occupancy, as a dwelling or otherwise, of the burglarized premises. The authorities are not inconsistent with this view. In 2 Enc. of Evidence, 815, it is said:

"Proof that one was in actual or constructive possession of the burglarized premises is sufficient to establish his alleged ownership."

This expression is in complete accord with the text in 3 Bishop's New Crim. Proc., sec. 137, where the author says that ownership in burglary means "any possession which is rightful as against the burglar."

There are numerous cases where the ownership was held properly laid, in indictments or information for burglary, in the person who was in the possession and occupancy of the burglarized dwelling. 9 C. J. 1044. But it does not follow from such decisions that occupancy is essential to constitute possession within the meaning of the rule laid down by Bishop. In *Hahn v. State*, 60 Nebr., 487, 83 N. W. 674, the ownership was laid in one who had charge of the building on behalf of non-resident owners. The court said: "The person living in, and having general charge and control of, the building was the owner thereof in contemplation of law, when applied to the crime of burglary." The expression just quoted, did not arise solely from the fact that the agent occupied the building. The building was a three story brick with stone basement. The burglary was committed in the hallway of the basement. The agent lived in rooms on the first story, which did not communicate with the basement. The court's opinion fairly indicates that the decision was primarily based, not upon the occupancy, but

upon the fact that the agent "had the charge and control of the entire building." The opinion cites the passage from Maxwell's Criminal Procedure hereinbefore quoted.

In *Avia v. State*, 42 Tex. Crim. 424, 60 S. W. 551, the facts are parallel with those in the instant case. The court there said:

"Appellant's third ground is there is a fatal variance between the allegation in the indictment and the proof. The indictment charged the house to be kept and controlled by D. H. Wilson, when the proof showed the house to be entirely empty, belonging to John C. Walker, of the city of Galveston, and was placed in the hands of D. H. Wilson, a real estate agent, to rent. The evidence shows that D. H. Wilson had the exclusive care, control and management of the property. This being the case, it is proper for the indictment to allege, as it does, the ownership in D. H. Wilson."

In our opinion, the decision in the above Texas case is correct and should be followed here. Burglary of an unoccupied dwelling house is not an offense against habitable security, but is a crime against property, the same as if the building were a shop, warehouse, or chicken house. The allegation of ownership in such cases is sustained by proof of either actual or constructive possession. Sec. 2 Enc. of Evidence, 215. No reason exists for drawing a distinction between possession in one's individual capacity and possession as an agent. In *People v. Smith*, 1 Parker's Crim. Rep. (N. Y.) 329, the possession was held by an agent.

In *State v. McGuire*, 193 Mo. 215, 91 S. W. 939, the following appears in the opinion:

"While it is true there was no direct evidence of ownership of the chicken house in Lee Stewart, as alleged in the information, there was an abundance of evidence that he was in the actual possession of it at the time of the burglary and such evidence sustained the allegation of owner-

ship in him. 'In burglary, ownership means any possession which is rightful as against the burglar.' "

In the instant case Watson undoubtedly had the possession of the house at the time it was burglarized. His testimony, which was not contradicted, was to the effect that he was the agent for a non-resident owner, and that as such agent he had entire charge, management and control of the premises. His duties as such agent consisted in the sale, renting, and care of the property generally. His possession, whether it be called actual or constructive, was rightful as against the defendant, and was such possession as satisfies the rule herein discussed. The trial court properly found that there was no variance between the pleading and the proof, as to the ownership, as the term "ownership" as applied to buildings is regarded in prosecutions for burglary.

The second and remaining question argued in the briefs is whether or not, assuming a variance to exist the same was prejudicial and constituted a ground for reversal. Since we hold that there was no variance, the second question becomes immaterial and need not be considered.

The judgment is affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9410.

In re Songer.

JUVENILE COURT—*Criminal Jurisdiction.* The Juvenile Court has no jurisdiction of the crime of rape even committed upon the person of an infant child.

(Laws of 1907 c. 149.)

Error to Denver District Court, Hon. John I. Mullins, Judge.

En banc.

Mr. D. J. DAVIES, for petitioner.

Hon. LESLIE E. HUBBARD, Attorney General; Mr. CHARLES ROACH, Mr. RALPH E. C. KERWIN, Assistant Attorneys General, for The People.

Opinion by Mr. Justice Teller.

In the matter of the application of Charles Songer for a writ of Habeas Corpus:

The petitioner, an adult, was tried in the Juvenile Court of the City and County of Denver, on a charge of rape, and was convicted and sentenced to the State Penitentiary. Having served nearly four years of his sentence, which was for not more than one hundred years, nor less than ninety years, he sued out a writ of habeas corpus in the District Court of said City and County.

The return to the writ set up the conviction and sentence in the Juvenile Court, to which the petitioner filed a demurrer on the ground (a) that the Juvenile Court was without jurisdiction, and (b) that the sentence is void as not authorized by law. The demurrer was overruled, and petitioner brings the case here on error.

Counsel for petitioner bases the attack on the jurisdiction of the Juvenile Court, on the case of *Colias v. People*, 60 Colo. 230, 153 Pac. 224, in which it was held that the statute which established the Juvenile Court and prescribed its jurisdiction (Chapter 149, Laws of 1907), did not give that court general jurisdiction to try criminal cases. The statute was held to give jurisdiction only in such criminal cases as came clearly within its spirit and letter, as affecting the interest of a child or a minor, under acts for their protection.

The State attempts to distinguish this case from the *Colias* case by referring to a statement in the return to the effect that the crime was committed on a minor daughter of the petitioner. We need not determine whether or not that statement was properly included in the return, because we do not think that, if the facts are as stated, they distinguish the cases. The statute limits the jurisdiction to criminal cases,

"in which the disposition, custody or control of any child or minor, or any other person, may be involved under the Acts concerning delinquent, dependent or neglected children, or any other Acts, statute or law of this State, now or hereafter existing, concerning dependent, delinquent or neglected children, or which may in any manner concern or relate to the person, liberty, protection, correction, morality, control, adoption or disposition of any infant, child, or minor, or the duties to, or responsibility for such infant, child or minor, or any parent, guardian or of any other person, corporation or institution whatsoever."

This language being plain and unambiguous, we held that criminal cases in the Juvenile Court are such only as are incidental to cases arising under the acts named. The crime of rape is a substantive offense under a statute which has no relation to the care or protection of minors. If all the acts mentioned in the statute quoted were repealed, rape would still be a crime punishable as it is now. The offense is the same no matter who is the victim, or what relation she sustains to the offender. Its punishment is for the protection of all the members of society, adults as well as minors. It involves the enforcement of the criminal laws of the state, and the liberty of the accused.

The case not arising under any of the acts named, the Juvenile Court did not have jurisdiction of it.

This judgment of the District Court is reversed, and the petitioner ordered to be released.

Judgment reversed.

Mr. Justice Scott and Mr. Justice Allen dissent.

No. 8991.

MULNIX, AUDITOR v. CITY AND COUNTY OF DENVER.

1. MANDAMUS—*When Allowed.* The relator must show a clear, legal right in himself, and a plain legal duty resting upon the respondent.
2. LUNATICS—*Expenditures by County for the support of Insane Persons* are not provided for by Rev. Stat. sec. 4150.

Error to Denver District Court, Hon. George W. Allen, Judge.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. FRANCIS E. BOUCK, Mr. JOHN L. SCHWEIGERT, Deputy and Assistant Attorneys General, for plaintiff in error.

Mr. JAMES A. MARSH, and Mr. THOMAS H. GIBSON, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

This is an action in mandamus to compel the Auditor of State, to audit and allow certain claims of the city and county of Denver, against the State, for the keeping and care of certain persons theretofore adjudged insane, in the aggregate sum of \$35,418, and to draw and issue warrants upon the treasury of the State, payable out of the insane fund in said treasury, in payment of said accounts, and each of them, and to deliver said warrants to the relator. The alternative writ was made permanent, and that judgment of the court is before us for review.

We may assume for the purposes of this case, but which we do not decide, that such claims when established are valid as against the State, but if so they are made so by section 4135 Revised Statutes 1908.

The writ shows the city to have properly complied with the procedure provided by said section. The only question to be considered is whether or not the State has properly provided an appropriation for the payment of the claims sued on, so as to justify the Auditor of State in issuing his warrants in payment thereof.

Section 33, Art V, of the constitution provides:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof."

This action was determined upon a demurrer to the writ. This court has declared the chief requisite to warrant the issuance of a writ of mandamus:

"First, the petitioner must show a legal right to have the act done which is sought by the writ; second, it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or to refuse; third, that the writ will be availing as a remedy, and that petitioner has no other plain, speedy and adequate remedy." *Daniels v. Miller*, 8 Colo. 542, 9 Pac. 18.

Included among the grounds of the demurrer was:

"That there is no valid and existing appropriation of the State of Colorado and no funds upon which a warrant of respondent could be legally and lawfully drawn in payment of the said claims and demands set out in the said alternative writ or any or either thereof."

The only allegation contained in the writ concerning an appropriation by the legislature from which it is contended that such claims may be paid is the following:

"That on the said 4th day of September, 1915, at the time of the presenting of said several accounts as aforesaid, there was, in the insane fund in the treasury of the State of Colorado then and there existing (being that certain fund established and maintained by the fractional mill levy provided for in section 4150 of the Revised Statutes of Colorado, 1908), money equal to the aggregate sum of said accounts, and all of them."

The levy referred to is a continuing appropriation made by the act of the legislative laws 1879, entitled "An Act to establish the Colorado Insane Asylum, and providing for its location."

Section 6 of the Act, now sec. 4150 Rev. Stat. 1908, provides:

"There shall be levied and assessed upon all taxable property in the state, real and personal, for the creation and support of such asylum as herein provided, a tax of one-fifth (1-5) of a mill on each and every dollar, to be known as the insane tax; such revenue to be assessed and collected in like manner with other revenues of the state."

This appropriation was for a specific purpose, "the creation and support of such asylum as provided herein." The accounts of the county in this case can in no sense be said to be included in such specific purpose. They are neither for the creation nor support of the asylum. They are clearly for services rendered by the county, in the case of insane persons committed to, but never admitted to the asylum, and before the enactment of the initiated statute of 1917, requiring the Board of Corrections to admit to the asylum, or provide care elsewhere, for all persons who may be committed to the asylum. These accounts cannot be construed to be within an appropriation for the creation and support of the asylum under the law as existing at the time they were incurred.

The large sum of money claimed by the city and county of Denver alone may of itself be sufficient, if used to pay these claims, to so cripple the operation of the asylum as to greatly interfere with the proper care of its inmates. We cannot assume that the legislature contemplated that the fund to be raised by the levy should be used for the payment of claims neither determined nor presented and not specifically designated by the appropriation itself.

No other appropriation for the payment of these claims is alleged, and we cannot assume that there was such.

It was said in *Nance v. The People*, 25 Colo. 252, 54 Pac. 631:

"The court cannot indulge in any presumption in favor of the relator; on the contrary, it will be presumed that state officials perform their duties according to law, and this presumption obtains until the contrary is shown, and in actions of this character the relator must, by clear statements, make it appear that he has a legal right to the relief asked. This he has failed to do in this case."

The question is one for the legislature and until such time as it may make a specific appropriation for the purpose, the auditor of state is without authority to act.

The judgment is reversed with directions to quash the writ and dismiss the proceeding.
Garrigues and Bailey, J. J., concur.

No. 9474.

YATES AND MCCLAIN REALTY COMPANY, ET AL. v. EL PASO NATIONAL BANK.

VENDOR'S LIEN—*Waiver of*—One having a vendor's lien upon real property for the purchase money thereof does not lose the lien by waiving the personal liability of the endorser of the obligation given by the purchaser.

Error to El Paso District Court, Hon. John W. Sheaffer, Judge.

Mr. C. B. HORN, Mr. MARTIN M. BURNS, for plaintiffs in error.

Messrs. CHINN & STRICKLER, for defendant in error.

Opinion by Mr. Justice Allen.

This is a suit brought by The El Paso National Bank against the plaintiffs in error to foreclose an equitable vendor's lien upon certain real estate. Upon trial the court found that the bank now has and holds a lien upon the real estate in question, and decreed a foreclosure of the lien.

Prior to the trial the court sustained the plaintiff bank's demurrer to the several defenses set up in the answer of the defendant The Yates & McClain Realty Company. This is assigned as error, and is the only matter argued by plaintiffs in error in their brief on application for a supersedeas.

It is admitted by the pleadings that the bank sold to the Realty Company the real estate in controversy. The consideration received consisted of promissory notes executed by one Geo. H. Paul, which were endorsed by the Realty Company, and by it transferred to the bank. At the time of the sale a contract was entered into between the

vendor and the vendee, whereby the deed to the property was not to be delivered until the notes were duly paid off and discharged. It is conceded that in this transaction the bank retained a vendor's lien upon the premises.

It is asserted, in effect, by the plaintiffs in error that the defenses, to which the demurrer was sustained, alleged facts showing that the plaintiff bank "by its conduct and manipulation of these notes * * * had waived the liability of the endorser," the defendant Realty Company. Assuming, without deciding or conceding, that the foregoing statement of the plaintiffs in error is correct, the facts therein contained are not sufficient to show that the bank waived or lost its vendor's lien.

The theory of the law apparently adopted by the plaintiffs in error, and the only proposition relied on, is "that by waiving the liability of the endorser on the notes" the bank "thereby waived the lien." No authorities are cited, and no reasoning is offered, to sustain this proposition. The case of *Hodges v. Roberts*, 74 Tex. 517, 12 S. W. 222, is an authority to the contrary. In that case it was held that although the plaintiff's vendor's right to a personal judgment against the vendee, as indorser on a note given for the land, was lost by negligence, the lien reserved by the vendor could still be enforced. The reason on which the decision was based in that lien was a security for the payment of the debt evidenced by the note. The court also said: "The existence of a debt is necessary to support a lien, but it does not follow from this that the debt must be that of the person creating the lien on which a personal judgment may be rendered against him."

Our attention is not called to any facts alleged in the answer from which it might be inferred that the plaintiff waived or lost its vendor's lien. It is not claimed that the lien was expressly released or that other security was substituted in its stead. Furthermore, it should be noted that the record shows that the legal title was never transferred by the vendor to the vendee, but was retained as

security for the payment of the notes. Circumstances which would create a waiver or cause the loss of a vendor's lien in cases where the vendor has transferred the title, do not have the same effect in cases where, as here, the vendor retains title. 2 Warville on Vendors, sec. 715.

In view of the foregoing circumstances, we are of the opinion that the demurrer was properly sustained and that the answer presented no facts precluding the plaintiff from foreclosing its lien. The case is controlled by the rule announced in 2 Warville on Vendors, sec. 715, as follows:

"By retaining the title, the vendor has manifested in the most unmistakable terms, his purpose of looking to the land as security for his debt; that security can only be divested by performance of the act for which the land is held, and equity will never compel him to part with the title until he has actually received the consideration."

See also 2 Jones on Liens, sec. 1116. The answer alleges no facts coming within any exception to the principle above stated.

No reversible error being pointed out in the brief on application for a supersedeas, the application is denied and the judgment affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9468.

VER STRATEN *v.* LEFTWICH, ET AL.

1. EVIDENCE—*Burden of Proof.* In an action upon contract the plaintiff has the burden of proving that the contract was as he alleges; he is not required to negative the defendant's allegation of an additional condition.
2. INSTRUCTIONS—*Harmless Error.* An instruction not prejudicial to the plaintiff in error is harmless.

Messrs. STOW, STOVER & SEAMAN, for plaintiff in error.

Mr. L. R. RHOADES, for defendants in error.

Opinion by Mr. Justice Allen.

This is an action which was begun by defendants in error, a firm of attorneys, against the plaintiff in error to recover a sum alleged to be due under a contract for legal services. According to the complaint, the contract was entered into by the parties above mentioned, and by the contract the defendant below agreed to pay to the plaintiffs one-half of all or any sum of money recovered from one W. H. Randall.

The defendant filed an answer which was in the form of a general denial, followed by allegations amounting to an argumentative denial, to the effect that instead of having made such a contract as that described in the complaint, the parties agreed that plaintiffs should have one-half of the amount actually recovered from the said Randall, only in case the consent of the brother of the defendant were obtained to the making of the contract, and that suit should first be brought.

A trial was had to a jury, the issues were found for the plaintiffs, and thereafter judgment was rendered upon the verdict. The defendant brings the cause here for review, and in asking for a reversal of the judgment relies solely upon error alleged to have been committed by the trial court in the giving of certain instructions.

The plaintiff in error complains of a part of the instructions relating to the burden of proof resting upon the plaintiffs below. The instructions upon this subject were numbered 2 and 7 and read as follows:

"No. 2. The burden of proof is upon the plaintiffs to establish that the contract was as claimed by them, including that they were to have one-half the recovery by settlement or compromise out of court or before suit; and if you so find and believe from the preponderance of the evidence your verdict should be for the plaintiffs in the sum of \$1,000.00.

"No. 7. Plaintiffs have no burden of proof to show that the consent of the brother of defendant was not required, nor to show that their contingent compensation of one-half of the recovery was not conditioned that suit should first be brought. Those conditions, alleged in answer of the defendant, while they constitute affirmative matters do not amount to affirmative defenses, but in effect are denials that the contract was made and denials that the bargaining therefor was in the terms alleged by plaintiffs."

It is assumed and conceded by both sides that instruction No. 2 is correct and that the defendant's answer amounted merely to denials, as the court said in the latter part of instruction No. 7. The defendant's objection is directed only to the first sentence of instruction No. 7 which relieves the plaintiffs of the burden of proof to show that the contract was "not as alleged by plaintiff in error," the defendant below.

The theory and the contention of the plaintiff in error is that the burden of proof was upon the plaintiffs below not only "to prove that the contract was as alleged by them," but also to prove that the contract was "not as alleged by defendant." This theory is erroneous, and the contention cannot be sustained, in so far as it relates to the alleged burden of proof that the contract was not as alleged by defendant. 2 Enc. of Evidence, 778. In this connection we adopt the following language used in *Wilder v. Cowles*, 100 Mass. 487:

"The burden upon the plaintiff is co-extensive only with the legal proposition upon which his case rests. It applies to every fact which is essential or necessarily involved in that proposition. It does not apply to facts relied upon in defense to establish an independent proposition, however inconsistent it may be with that upon which the plaintiff's case depends. It is for the defendant to furnish proof of such facts; and when he has done so the burden is upon the plaintiff not to disprove those particular facts, nor the proposition which they tend to establish, but to maintain the proposition upon which his own case rests."

Applying the rule above quoted to the instant case, the burden upon the plaintiffs was to prove the contract described and relied on in their complaint, and they were not bound to go further and disprove facts brought out by the defendant either in his pleading or in the evidence. Instruction No. 7 does not relieve the plaintiffs of the burden of making out their case, but correctly states the law to the effect that the plaintiffs have no burden of proof to disprove any particular facts attempted to be shown by the defendant which are inconsistent with any fact or facts essential to the plaintiffs' cause of action.

For the reasons above indicated, there was no error in the giving of instruction No. 7.

The other instructions complained of are numbered 6 and 9 respectively. It is contended that they relate to matters which are not within the issues made either by the pleadings or the evidence. Instruction 6 merely goes to the extent of stating that a condition upon which the making of a contract depends may be waived. Instruction 9 relates to circumstances under which the brother of the defendant might be deemed to have ratified the "bargain or contract made between the plaintiffs and defendant." It is not shown by the argument how these instructions could result in prejudice to the defendant below. The evidence in the record, and all the instructions given in the case when read together, show that no prejudice resulted to the defendant from the giving of the instructions complained of.

We find no reversible error in the record. The application for a supersedeas is denied and the judgment affirmed.

Affirmed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9448.

No. 9457.

THE PEOPLE, EX REL. v. COLORADO TITLE AND TRUST COMPANY, ET AL.

THE PUBLIC UTILITIES COMMISSION v. COLORADO TITLE AND TRUST COMPANY, ET AL.

1. GENERAL ASSEMBLY—*Delegation of Power.* The state has inherent power to regulate and control public utilities operating within its limits, and the General Assembly may delegate this authority to a commission, and authorize such commission to permit the discontinuance of service upon a public railroad, and the dismantling thereof.
2. PUBLIC UTILITIES COMMISSION—*Powers.* The statute (Laws 1913 c. 127) confers upon the commission exclusive jurisdiction to determine whether a railroad company may suspend service upon, and dismantle, a railway lying wholly within the state. Under the act of 1915 (Laws 1915 c. 134) the commission has the same control over a receiver of a railroad as over the railway company itself, before the appointment of the receiver.
3. CONSTITUTIONAL LAW—*Judicial Power.* The ascertainment of the facts necessary to the just exercise of the powers conferred by the statute, and the exercise of judgment thereupon, is not the exercise of judicial power, and is in no sense an invasion of the Constitution.

Teller and Bailey, J. J.'s concur, solely upon the ground that the District Court denied the application of the Attorney General to intervene in behalf of the people.

Error to El Paso District Court, Hon. J. W. Sheafor, Judge.

Mr. LESLIE HUBBARD, Attorney General, Mr. CHARLES ROACH, Deputy Attorney General, Mr. HORACE N. HAWKINS, Mr. I. B. MELVILLE, Mr. C. M. HAWKINS, Mr. M. I. O'MAILIA, for The People.

Mr. A. P. ANDERSON, Mr. L. J. WILLIAMS, for The Public Utilities Commission.

Mr. W. V. HODGES, for The Colorado Title & Trust Company, as Trustee.

Mr. C. C. HAMLIN, for The Colorado Midland Railroad Company.

Mr. GERALD HUGHES, Mr. C. C. DORSEY, Mr. W. M. BOND, Jr., for A. E. CARLTON, Receiver.

These cases present the question whether the Public Utilities Commission of this state has exclusive and original jurisdiction regarding the cessation of operation upon, and the abandonment and dismantling of, the Colorado Midland Railroad, and whether the receiver of the road should apply to this commission for leave to cease operation, and the abandonment and sale of the line, and whether that portion of the District Court order directing and commanding the cessation of operation upon, and the dismantling of, the road by the receiver without the consent of the commission is null and void, as having been made without jurisdiction. In other words, does the Public Utilities Act of 1913, as amended in 1915 and 1917, confer upon the Commission, regardless of the court's order appointing a receiver, exclusive jurisdiction to pass upon the question of operating, abandoning, or the dismantling and "junking" of a line of railroad, lying wholly within the state.

The Colorado Midland, completed about 1889, was operated under the name of the Colorado Midland Railway Company until June 1, 1917, when it was taken over and operated by the Colorado Midland Railroad Company. Two million dollars in bonds, secured by a deed of trust, were issued by the latter company to the promoters of the new organization, for money they invested in the road, and the Colorado Title and Trust Company was named trustee. In December, 1917, the property was taken over by the U. S. Railroad Administration, but was released June 21, 1918.

July 1, 1918, the Trust Company began a foreclosure suit in the District Court of El Paso County. The bill alleged that the Midland could not longer be operated as a railroad, that no purchaser could be found who would buy the property as an entirety and undertake to operate it as

a railroad, and prayed that its operation be discontinued, that it be dismantled and sold, and asked for the appointment of a receiver, which was accordingly done without opposition, the railroad company appearing and consenting thereto. The next day, July 2nd, the receiver filed in court his application asking for a court order allowing the abandonment of service upon, and directing the sale of, the road, and all its equipment in lots and parcels and at public or private sale. The court thereupon entered an order permitting and directing the receiver to sell, either in separate parcels, or otherwise, as he might determine, the road, and its entire properties and equipment, and to remove and sell the rails and tracks, and to permanently abandon and discontinue service thereon, and not further operate it as a railroad, the order to become effective August 5, 1918. It is a "junking" order to permanently cease operations upon, tear up the track, dismantle the road and to sell its component parts. Under the order it no longer was to be used as a railroad, or devoted to public service. This order was entered July 2nd without notice to the Public Utilities Commission, but was not to go into effect until August 5th. to comply with general order No. 15 of the Public Utilities Commission which provides as follows:

"In the matter of abandonment and discontinuance of tracks and service of steam and electric carriers. It is hereby ordered, by the Public Utilities Commission of the State of Colorado that no electric street railroad, interurban railroad or steam railroad shall discontinue its service, or abandon its line of railroad, or any part thereof, or remove its tracks, or any part thereof, without first having filed with this Commission a written notice of its intention to discontinue, abandon or remove its service or tracks, or any part thereof, within the State of Colorado; said notice to be filed with the commission thirty days prior to the discontinuing of its service, or the abandonment or removal of its tracks, or any part thereof."

July 3rd a copy of the court order was filed with the commission along with written notice of the intention of the receiver to discontinue service Aug. 5th, and thereafter remove the tracks. Thereupon the Board of County Commissioners of Park County, and a large number of other complainants, filed complaints with the commission against its permitting the "junking" of the road; individual protests were also filed in addition to the formal complaints. The railroad and the receiver were served with notice of these complaints, and filed pleas to the jurisdiction in the nature of demurrers, challenging the jurisdiction of the commission. They claimed the commission had no jurisdiction and that the court had exclusive jurisdiction, and also took the position that the commission was without jurisdiction to proceed in the premises because the District Court had already signed and entered a decree discontinuing operations upon, and dismantling the road, and claimed it had the constitutional right to enter such an order which deprived the commission of jurisdiction, and that the commission would be in contempt of court, if it interfered with the receiver in carrying out the order of July 2nd. Complainants claimed the commission had exclusive jurisdiction in such matters, and that the court was without jurisdiction to enter such an order. Argument before the commission upon the question of jurisdiction was begun July 25th, and concluded at 4:30 July 26th, and then taken under advisement until July 30th, at which time the commission would again convene, and the commission announced that in the meantime it would appear before the court that entered the order, and endeavor to secure a modification thereof, and further stated that, if the commission determined July 30th that it had jurisdiction, evidence would then be taken.

July 29th, the commission appeared, as announced in the District Court and objected to that portion of the order directing the receiver to cease operations upon and dismantle the road, and moved the court to either modify or

vacate the order. The motion was based upon the ground that the court was without jurisdiction to enter such an order, such power being vested exclusively, as it was alleged, in the commission. To this motion the receiver and the railroad filed pleas to the jurisdiction in the nature of demurrers. The Attorney General then appeared at the same time (July 29th), and asked leave to file a petition in intervention which raised the same question, namely, that of discontinuing operations upon and dismantling the road, he claiming on behalf of the state that in these matters the jurisdiction of the commission was exclusive. The motion of the commission, and the motion of the Attorney General, came on, July 29th, for hearing before the court that entered the order, and after argument were continued to August 3rd. Meanwhile, July 30th, the commission met pursuant to adjournment, and made its final ruling on the question of jurisdiction, overruling the demurrers, and holding it had exclusive jurisdiction, and would proceed immediately with the taking of testimony, and would allow one day on a side only. Complainants objected to so short a time, and moved for a continuance on account of the large number of their witnesses, and the alleged physical impossibility of procuring witnesses from so far away along the line of road, and, the motion being overruled, introduced no evidence, though one individual protestant introduced some testimony. The receiver and the company introduced their evidence. The commission then took the matter under advisement. August 3rd the motions in the District Court came on again, pursuant to continuance for hearing and final determination, and the court then ruled that it had jurisdiction to enter the order of July 2nd, and overruled both motions, leaving the order of July 2nd in full force and effect. At midnight, Aug. 4th, service was abandoned, and Aug. 5th the receiver proceeded to enforce the court order, and to dismantle the road until stopped by a restraining order from this court. August 12th motion for a new trial was denied.

The assignments of error are that the court erred in holding that it had jurisdiction to enter the order of July 2nd; that it erred in holding that the commission did not have exclusive jurisdiction over the cessation of service upon, abandonment of the line, and "junking" of the road; that it erred in denying the motion of the commission to vacate or modify the court order of July 2nd; that it erred in refusing to allow the Attorney General to intervene on behalf of the state; that it erred in refusing to direct the receiver to apply to the commission for leave to cease operations; that it erred in allowing the court order to become effective Aug. 5, 1918; that it erred in entering the order directing the cessation of service upon and the sale and "junking" of the road without application having first been made to the commission by the receiver and permission granted therefor; that it erred in denying a motion for a new trial, and that it erred in entering the final order Aug. 3, 1918, denying the motion of the commission and the motion of the Attorney General.

Garrigues, J., after stating the case as above:

1. Though the legislature has the power, it would be impracticable for it to directly determine the abandonment of service upon and dismantling of a railroad. Therefore, it may delegate such power to a commission. One of the questions in the case is—was such power delegated?

The legislature may prescribe the method for the administration of public service corporations. The state has inherent power to regulate and control public utilities within the state, and, to this end, it is well settled the legislature may create a commission to which it may delegate governmental authority and supervision, and that the right to do so exists without any constitutional provision; that is, the power of the legislature to regulate the service of public utilities may be exercised through a commission, although the constitution is silent on the subject. The powers of the commission in such cases are administrative. Its duties are to administer the law and carry into effect the will of the legislature.

2. The only complaint of plaintiff in error is that the receiver failed to make application to, and obtain from, the commission its assent and sanction to abandon service and dismantle the road, and such failure is the only question involved that will be considered. That is, whether the District Court or the commission was vested with exclusive jurisdiction over the abandonment of service and the dismantling of the Midland railroad lying wholly within the state. If the commission possesses the exclusive jurisdiction, then the court order of July 2nd is void, and all other questions in the case are immaterial. There is no question about the jurisdiction of the District Court to entertain the foreclosure suit, appoint a receiver and order the sale of the property on foreclosure. The point is—did it have the right to go further and hear and determine the matter of ceasing to operate and “junking” the road? If the commission had gone ahead, regardless of the court’s order, it would either have had to concur therein, or direct the receiver to do something different, and in the latter event there would have been a conflict of jurisdiction, and an apparent contempt of court. To avoid this happening, if the jurisdiction of the commission was usurped by the court, the commission, under the circumstances, had a right to appear in court and ask the court to vacate or modify the order to avoid a conflict of jurisdiction, and in case the court refused, to have the ruling reviewed.

3. Whether the commission has jurisdiction over the ceasing of service upon and the dismantling of a railroad, is a judicial question for the court, but the exercise of that jurisdiction, by the Commission, is the exercise of administrative power, delegated to the commission by the legislature. Under the act power is conferred upon the commission to regulate the service, which includes power over the operation of the railroad and the maintenance of the tracks. Power to regulate service necessarily includes power over the thing to be regulated. This act confers upon the commission sufficient authority, when the public

interest requires that no change should be made, to prevent a railroad company from ceasing service upon and dismantling the road without the consent of the commission.

Railroad Commission v. K. C. S. Ry. Co., 111 La. 133-139, 35 So. 487; *State, ex rel. v. Brooks-Scanlon Co.*, 143 La. 539, 78 So. 847.

We therefore conclude that the Public Utilities Act confers exclusive jurisdiction upon the commission to determine whether a railroad company may abandon service upon and dismantle a railroad, lying wholly within the state.

4. Was the receiver appointed by the court subject to the same control as the railroad before the appointment of the receiver? Yes. The act, as amended in 1915, gives the Commission jurisdiction over receivers appointed by any court whatsoever. By section 2, receivers of railroads appointed by the court are declared to be common carriers, and subject to the act. The act provides that the commission shall enforce all statutes of the state affecting public utilities unless the enforcement is placed specifically in some other tribunal. Nowhere is power vested specifically in the District Court by any statute to enter such an order. In *State ex rel. v. Flannelly*, 96 Kans. 372, 381, 152 Pac. 22, 26, it is said:

"The next question is, Are the receivers subject to the control of the public utilities commission, under the public utilities act? The Kansas Natural Gas Company, whose property is now in the possession of the receivers, and whose business is now being conducted by them, was engaged in the business of a public utility. When the receivers continue to do the same business and render the same service as that performed by the Kansas Natural Gas Company they are a public utility, as defined in the public utilities act, and are subject to the provisions of the act. The appointment of receivers to carry on the business of a public utility does not withdraw that public utility or its receivers from the control of the laws of the State. The

public utilities commission can make the same orders, rules and regulations governing these receivers and the property in their control that they could have made concerning the Kansas Natural Gas Company and its property before the receivers were appointed. The receivers have the same right to appeal to the courts, that the Kansas Natural Gas Company had—no greater, no less.”

5. We are satisfied the statute, if free from constitutional objections, delegates to the commission exclusive jurisdiction over the operation, cessation of operation upon, and the dismantling of railroads within the state.

The constitutional objection raised to the statute is that it confers judicial power upon a commission. It is also claimed that the motion of the receiver for a “junking” order, called into play the District Court’s inherent equity power to determine a judicial question, and being a constitutional court, the statute, in so far as it attempts to confer exclusive jurisdiction upon the commission and take it away from the District Court, if it does, is unconstitutional, and the court having previously acquired jurisdiction and decided the matter, its determination is conclusive upon the commission.

The Public Utilities Commission is not a court; but is an administrative commission, having certain delegated powers, and charged with the performance of certain executive and administrative duties, and its powers are subject to the action of the courts in matters of which the courts have jurisdiction. The legislature did not give the commission power to render judicial decisions or jurisdiction over remedial rights as exercised by the courts. Judicial powers relate to the authority exercised by courts through the instrumentality of judicial remedies. The legislature did not confer upon the commission such judicial powers as courts are required to exercise in suits between litigants. The power to ascertain from the facts whether a railroad company should discontinue service upon and dismantle the road is delegated by the legislature to a commission. The

commission acts upon the existence of facts which it must determine, but this is not the exercise of judicial power in a constitutional sense. In administering the law in such a case the commission must necessarily determine many things and facts; this involves investigation, and the exercise of judgment and discretion, incidental to the administration of the law. Because it is of a judicial nature or the exercise of quasi judicial functions does not contravene the Constitution. The determination of certain facts or things in the operation of the law is merely incidental to the administrative powers of the commission. The legislature could delegate power to determine the facts and things upon the decision of which the operation of the law is made to depend. This is not the exercise of judicial power by a commission in the sense that courts administer judicial remedies, but is incidental to the exercise of delegated administrative powers. The exercise of judgment and discretion as an incident to such power is not the exercise of judicial power within the meaning of the Constitution. The authority delegated to the Commission relates to the administration of the law and not to the exercise of judicial remedies. The preliminary determination of facts required to be solved by investigation and the exercise of judgment and discretion are but incidental to the commission's administrative duties. *Consumers' League v. C. & S. Ry. Co.*, 53 Colo. 54, 74, 125 Pac. 577, Ann. Cas. 1914A, 1158; *C. & S. Ry. Co. v. Railroad Commission*, 54 Colo. 64, 129 Pac. 506; *D. & S. P. Ry. Co. v. City of Englewood*, 62 Colo. 229, 161 Pac. 151; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *State ex rel. v. Mo. Pac. Ry. Co.*, 76 Kan. 467, 92 Pac. 606; *State ex rel. v. Kan. P. T. C. Co.*, 96 Kan. 298, 305-306, 150 Pac. 544; *State ex rel. v. Andrae et al.*, 216 Mo. 617, 629, 116 S. W. 561; *State ex rel. v. Chittenden*, 127 Wis. 468, 502, 107 N. W. 500; *State ex rel. v. Public Service Com.*, 94 Wash. 274, 279, 162 Pac. 523.

The following cases are also in line as sustaining the exclusive jurisdiction and powers of the Commission: *Bor-*

ough of New Brighton v. New Brighton Water Co., 247 Pa. 232, 93 Atl. 329; *St. Clair Borough v. Tamaqua Co.*, 259 Pa. 462, 103 Atl. 289; *Pittsburg Rys. Co. v. City of Pittsburg*, — Pa. —, 103 Atl. 959.

Reversed with directions to the District Court to vacate that portion of the order of July 2nd directing the receiver to cease operations upon and to dismantle the road.

Reversed, with directions.

Decision *en banc*.

Mr. Justice Bailey and Mr. Justice Teller agree in conclusion of reversal only.

Mr. Justice Teller concurring specially:

I concur in the judgment of reversal upon the sole ground that the court erred in denying the application of the Attorney General to intervene on behalf of the people.

I can not agree that the Public Utilities Commission has exclusive jurisdiction of the question of dismantling the road, under the circumstances presented by this record. The Constitution gives to the District Court "original jurisdiction of all causes at law and in equity," and that includes the foreclosure of mortgages and all matters incident thereto. As an incident to their powers, courts of equity, in foreclosure proceedings, determine how property subject to a lien in process of foreclosure shall be sold, in what parcels and upon what terms, with a view to giving full relief to the mortgagee, with as little sacrifice as may be to the owner of the encumbered property, or others interested therein.

In this case it was incumbent upon the court to make all orders necessary to give the plaintiff the benefit of its security in such a way as to cause the least loss to the parties interested in the property either as owners, or otherwise; this in pursuance of the chancery rule of doing complete equity to all parties before the court.

The continued operation of the road being a matter of public interest, the State is entitled to be heard upon the question of dismantling the road. This fact appears to

have been recognized in recent cases, which are authority also on the question of jurisdiction.

In *State of Iowa v. Old Colony Trust Co.*, 131 C. C. A. 581, the state was a party in a suit in which the jurisdiction of a court of equity, in a foreclosure suit to direct the dismantling of a railroad, was directly involved. The Circuit Court of Appeals held that the lower court had such jurisdiction. The opinion, after stating the condition of the road as disclosed by the record, says:

"In these circumstances, what could the court, charged with the duty of caring for and protecting the whole property, have done except to order the abandonment of the steam line and the sale of its salvage?"

In *N. Y. Trust Co. v. P. & E. St. Ry. Co.*, 192 Fed. 728, the court said:

"The conclusion reached is that a court of equity, having possession of the *res*, with the parties before it, including the Attorney General, the proper representative of the state, has the power, in an insolvent situation like this, to dispose of the property in a way which may be for the best interest of the mortgagee; and if necessary in order to realize anything from the property, to order a sale in the alternative."

The order was that the road be offered as a going concern, and, if not sold at a price equal to its salvage value, that it be sold for dismantling.

The District Court, having jurisdiction of the question, could not be deprived of it by legislative enactment; and, having taken jurisdiction of the cause, should, after allowing the people to be represented, proceed to try the question of dismantling the road.

I am authorized to state that Mr. Justice Bailey concurs in this opinion.

No. 8890.

WILSON v. CITY AND COUNTY OF DENVER.

1. WORDS AND PHRASES—*Wages*, in common usage imports the compensation of laborers and domestic servants only.
A municipal ordinance prescribed the fee to be charged by an employment agency, as a certain per cent of "one month's wages and board." Held not to be applied to those seeking technical or clerical positions.
2. POLICE POWER—*Limitation of*. The right to follow a lawful calling is a property right, and cannot be abridged by any exercise of the police power, unless (1) the interests of the public generally require such interference, and (2) that the regulations proposed are reasonably necessary, and not unduly oppressive upon the individual.

Error to Denver County Court, Hon. Ira C. Rothgerber, Judge.

Department One.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. JACOB V. SCHAEZEL, Mr. GEORGE O. MARRS, Mr. JOHN HIPPI, for plaintiff in error.

Mr. JAMES A. MARSH, Mr. GEO. Q. RICHMOND, Mr. LAWRENCE LEWIS, Mr. NORTON MONTGOMERY, for defendant in error.

Opinion by Mr. Justice Teller.

PLAINTIFF in error was convicted in the Municipal Court of violating an ordinance of the City and County of Denver, which provides that an employment agent shall not charge a fee in excess of five per cent of the first month's wages and board for procuring employment for a male person. On appeal to the County Court, he was tried upon the following stipulation of facts:

"The defendant, O. C. Wilson, is manager of the Interstate Business Exchange Corporation, an employment agency licensed under the ordinance hereinafter quoted, although the license fee has been paid under protest. This

agency operates what is known as the Interstate Employment System, maintaining offices in the Kittredge Building in Denver, where its business has been conducted for a period of ten years last past. It lists applicants, investigates their recommendations, experience and qualifications, and recommends applicants for vacancies. No charge is made for the service rendered the employer. The applicant is charged a \$2.00 fee when he makes a first application with the corporation for employment. This fee is for the purpose of investigating the applicant's record, and permanently filing the same to be used in his behalf, and also the classification of his qualifications, so that he can be notified at any time there is a position open which the corporation believes he will be interested in and qualified to fill, provided the fee of \$2.00 is not withdrawn. This fee is refunded if a position is not secured within thirty days, provided claim is made in writing for its return before the lapse of that time.

Upon the applicant's acceptance of a permanent position secured either directly or indirectly through the efforts of the corporation, the applicant agrees to pay as a commission an amount equal to one-fourth of his first month's salary, in a position paying less than \$1,000.00 per annum; and an amount equal to one-third of his first month's salary in a position paying \$1,000.00 or over per annum.

On the third day of August, 1914, one J. H. Holmes made application to the corporation for a position as mine clerk, and signed the regular application, a copy of which is hereto attached. His duties were office and clerical, and he was charged no registration fee for this application, having paid the registration fee at the time of securing previous employment. The corporation secured him a position as mine clerk at \$90 per month, which he accepted.

He was charged 33⅓ per cent of the first month's salary paid him in the position which the corporation secured for him. This amounted to \$30.00, and in payment he executed to the Interstate Business Exchange Corporation his prom-

issory note for \$30.00, which note was subsequently paid during the period of his employment.

It is claimed by the City and County of Denver that the taking of this note and the collection of the same constituted a violation of section 833 of the ordinance rendering Wilson liable to fine."

This statement was supplemented by testimony of plaintiff in error, from which it appears that his organization advertises largely over a wide territory, both for applicants for positions, and for positions for applicants; that applicants are solicited from commercial colleges and engineering schools; that each applicant's record is investigated, and the result thereof, if satisfactory, kept on file; that a great part of the business consists in finding places for men of special and technical education; that it does not find employment for artisans, laborers, domestic servants and such; and that only individual positions are dealt with.

It appears, further, that witness had been carrying on said business in Denver for ten years, and that the organization has regular customers who secure through it, from time to time, persons for executive, technical and clerical positions.

Plaintiff in error was convicted in the County Court, and brings the cause here on error.

Sec. 831. "It shall be the duty of all persons who may obtain such license to keep the same publicly exposed to view in a conspicuous place in their office or place of business, together with a printed schedule of the fees to be charged for service, which shall be as follows, to-wit: For males, five per cent, and no more, on one month's wages and board; and for females, three per cent, and no more, on one month's wages and board; and no other so-called bonus or fee shall be exacted from said applicant. Every person paying the required fee shall receive a receipt for the same, which receipt shall state in plain terms the agreement between the intelligence or employment agent or broker and the person paying such fee, and if the terms

of said agreement are not fulfilled, then said fee shall be returned to the person who paid the same."

It is the contention of plaintiff in error that the ordinance, properly interpreted, does not apply to his business. In support of this position he cites the fact that the fee to be charged by licensed employment agencies is a fixed percentage on a month's "wages and board," terms which are not ordinarily used in connection with compensation for technical, executive or clerical services. The defendant in error replies by citing numerous cases in which the term "wages" is held to include salary, and all kinds of compensation for services rendered for a stated period. The most of these cases, however, involve the construction of statutes under which a party claimed compensation for services rendered, which the cases held were covered by the word "wages," giving it a broad meaning so as to protect rights which were apparently within the purview of the statutes under consideration. Some of the cases involved the bankruptcy act, which makes a man earning not more than \$1,500 per year a "wage earner."

It can hardly be doubted that in common usage the term "wages" is applied to the compensation of laborers, artisans and domestic servants only. In Webster's New International Dictionary wages is defined as "pay given for labor, usually manual or mechanical, at short stated intervals, as distinguished from salary or fees." In *First Nat. Bank v. Barnum*, 160 Fed. 245, it is said that:

"Wages, as distinguished from salary, are commonly understood to apply to the compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month or season. * * * Salary, on the other hand, has reference to a superior grade of services. * * * By contrast, therefore, wages indicate inconsiderable pay for a lower and less responsible character of employment."

To support this statement cases from fifteen states are cited. In *Matter of Stryker*, 158 N. Y. 526, 53 N. E. 525,

70 Am. St. 489, it is said that "the word (wages) is applied in common parlance specifically to the payment made for manual labor, or other labor of menial or mechanical kind, as distinguished from salary and from fee, which denote compensation paid to professional men."

In *People v. City of Buffalo*, 57 Hun. 577, 11 N. Y. Supp. 314, the court held that a law giving every employe of a city the right to weekly payment of his wages did not apply to a clerk in the mayor's office. It was pointed out that, though the term "employe" was very broad, it was to be interpreted in connection with the term "wages"; and, since only those who earned wages were to be paid weekly, the statute was intended for the benefit only of laborers and workmen. The court adds that clerks, teachers and the like are not within the class needing the protection which the law was framed to give.

So, here, it may properly be said that the persons with whom plaintiff in error deals are not in need of the protection which this ordinance was intended to give.

It is true, as counsel for the city state, that many miners, mechanics and laborers are highly intelligent, and need no protection, but that does not change the fact that many members of the class to which they belong—for a time—do need protection. It is for the benefit of those less intelligent persons that the ordinance was adopted.

When we consider the use of the term "board" in connection with "wages" in that part of the ordinance which prescribes the fees to be charged, and the only part which mentions the compensation, it is clear that it was not intended to apply to persons seeking technical or clerical positions. These terms must be held to limit the application of the general language of the ordinance; and we come to this conclusion the more readily because, as stated by the New York court above mentioned, men of the class just mentioned do not need the protection in question; and, that being so, to include them in this limitation of the right to contract freely would be an unnecessary and, therefore, an

unauthorized exercise of the police power. *Philips v. Denver*, 19 Colo. 179, 34 Pac. 902, 41 Am. St. 240.

In this connection it may be noted that the portion of section 831 of the ordinance which prescribes the fees to be charged is identical with section 1 of the Act of 1893 (Sec. 2481, R. S. 1908), which in terms provides that the law shall not apply to persons other than "a day laborer, mechanic, artisan or household or domestic servant."

The right to carry on a legitimate business is a property right, and it can not be taken away or abridged by an exercise of the police power, unless it appears "first that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 388, 14 Sup. Ct. 490.

This ordinance does not meet either of said requirements.

For the reasons above stated we are of the opinion that the judgment should be reversed, and it is so ordered.

Judgment reversed.

Chief Justice Hill and Mr. Justice White concur.

No. 9031. .

GRAFF v. THE PEOPLE.

1. **NEW TRIAL**—*Newly Discovered Evidence—Diligence.* One convicted of crime, and applying for a new trial on the ground of newly discovered evidence, is not to be deemed negligent in not seeking for the evidence newly discovered from a witness who testifies upon his trial, and who was manifestly intent to clear herself of the same accusation, where the effect of the new evidence is to charge the witness.
2. **EVIDENCE**—*Party Discrediting His Own Witness.* A witness called by the District Attorney in rebuttal to impeach or discredit the accused declines to do so. The District Attorney, though surprised by this refusal, is not to examine the witness as to the irrelevant matters tending to besmirch or discredit her.

Error to Denver District Court, Hon. W. D. Wright, Judge.

Mr. O. N. HILTON, Mr. PHILIP HORNBEIN, Mr. CAESAR A. ROBERTS, Mr. LESLIE M. ROBERTS, for plaintiff in error.

Hon. LESLIE E. HUBBARD, attorney general; Mr. CHARLES ROACH, assistant attorney general, for The People.

Chief Justice Hill delivered the opinion of the court:

THE plaintiff in error, a licensed physician, hereafter called the defendant, was convicted of procuring the miscarriage of one Mrs. Ruth Kamp, which it is claimed caused her death. He was sentenced to the penitentiary for from eleven to thirteen years, and brings the case here for review upon error.

In his motion for a new trial, the defendant, among other things, alleges newly discovered evidence. To sustain this claim, he presented the affidavit of Mrs. Kate Dunn to the effect that she was and had been, since 1898, a trained nurse, residing in Denver about fifteen years; that from about the middle of January, 1916, until after the 20th, following, she had occasion to call on a Mrs. Lewis at her rooms, known as No. 5, 827 Sixteenth Street, Denver; that as nearly as she could fix the date, on January 19th, 1916, a young woman came to said rooms to see the woman, who had inserted an advertisement relative to women's diseases; that Mrs. Lewis was then absent; that while waiting the young woman confided to affiant that she was in a family way; that she had taken drugs, at least \$20.00 worth, and got no relief and was told by parties that nothing but a surgical operation could relieve her; that affiant told her it was dangerous, and that she being young and strong, ought to go through to pregnancy; that she replied she would rather die than have the child; that she was going to get rid of it; that she asked affiant if she would nurse her; that affiant said "No"; that the young woman was about five feet three inches in height, weighed from one hundred thirty to one hundred thirty-five pounds, was light complexioned, brown eyes, brown hair, rather inclined to be fair, and in her manner was set and determined; that no

reasoning of affiant could move her from her determination to see some person who could relieve her, as she called it; that on the next day, or as affiant believes, on the 20th of January, 1916, in the afternoon, and between two and four o'clock, the same woman called again, and came into Mrs. Lewis' rooms and told her troubles, when affiant then stepped out into the waiting room, and Mrs. Lewis closed the door and continued to talk with the woman some minutes; that later Mrs. Lewis came out of the room where she was talking with the young woman, and went to a closet leading off from the room where affiant was sitting, and procured a speculum, a probe, and a pair of forceps, and put them in a bag or satchel, and went back into the room where the young woman was; that she was absent in the room with the young woman about forty to fifty minutes; that when Mrs. Lewis came into the room where affiant was, she said to affiant, "I have an A B case and I want you to nurse her," to which affiant replied, "I can not do that"; that then Mrs. Lewis stepped out of the room, and affiant heard her at the telephone, and heard her try to get several persons, but did not distinguish the names; that about an hour later, or about 5 p. m., Dr. Bennett Graff called at the rooms; that affiant remembered him from the fact that about ten years prior affiant had nursed a case under him, a surgical case involving a fractured arm; that Dr. Graff went into the room where the young woman was, and about fifteen minutes later he came out with the young woman, who was very pale, weak, and seemed distressed, and Dr. Graff took the young woman away with him; that affiant paid no further attention to the matter until afterwards, when, on reading the paper, affiant saw that Dr. Graff had been convicted of abortion upon Ruth Kamp; that it was stated that Dr. Graff had come to the rooms of Mrs. Lewis to get the girl, and the affiant recalled the circumstances and saw the attorneys for Dr. Graff on July 4th, 1916, communicating the facts to them; that affiant further recalls that no one was in the room while Mrs.

Lewis was with the young woman, and that affiant only remained in the sitting room because she expected to get back into Mrs. Lewis' room where the electric battery was, which affiant was using and had been using for several days to get relief from a tumor with which affiant is troubled; that after Dr. Graff left with the young woman, affiant went back into Mrs. Lewis' room, and finished her treatment with the battery. Affiant further says that the expression, "An A B case," is used and means an abortion case, and that when Mrs. Lewis said to affiant that she had "An A B case" for affiant to nurse, affiant knew that it was a case of abortion, and therefore refused the same.

There is testimony to the effect that Mrs. Kamp, the young woman in question, was at Mrs. Lewis', as stated in this affidavit, and that the defendant was phoned to come there by Mrs. Lewis; that he came and, after consultation with the young woman, took her away; that Dr. Brown, a witness for the people, had, a short time prior thereto, examined her; that he found she was about four and one-half months pregnant. The defendant testified that the deceased told him that she was married; that she was in a family way; that she had taken numerous drugs, and done many other things to bring on a miscarriage; that she had consulted two doctors, a Dr. Brown, and one other whose name she did not care to divulge; that upon being called, he told her that her condition was serious, advised that her husband be sent for at once (which it is agreed was done), and that he administered to her the necessary treatments to ward off the effects of her acts and that of others, if such had been committed, and if possible to prevent a miscarriage; that regardless of all that he could do, her condition became worse, and the premature birth commenced to come on, when, in order to save her life, it became necessary to assist it. There is testimony of several other physicians that if the conditions were as the defendant testified, that his treatment was proper throughout. In such circumstances, the testimony of the nurse to the facts stated in

her affidavit were important and material in aid of defendant's contention that previous attempts had been made to procure a miscarriage before he was called to attend the case. The fact alone, if it be true, that Mrs. Dunn saw the deceased twice in the rooms of Mrs. Lewis, which was shown to be several blocks distance from the defendant's office, coupled with the fact of Mrs. Lewis taking instruments used in such cases into the room where the deceased was at the time, and remaining there alone with her for some time, and immediately afterwards telling the affiant the kind of a case it was, all tend to sustain the defendant's contention that an abortion had been attempted before he was called. This was new and a different line of testimony on that subject, and all of which, outside of the statements of the deceased, was not cumulative testimony of any fact that had been testified to at the trial. For these reasons it was proper to be considered on the sufficiency of the motion for a new trial. *Garcia v. The People*, 59 Colo. 434, 149 Pac. 614; Vol. 2, Thompson on Trials (2nd ed.), Sec. 2762.

The Attorney General does not dispute the correctness of the position above outlined, but contends that it ought not be considered, for the reason that there is no showing on the part of the defendant that he used reasonable diligence to procure this testimony prior to the trial. In this we can not agree. In his motion for a new trial, the defendant alleges that this evidence could not, by any reasonable diligence, have been discovered at the time of trial. The record is to the effect that he did not know of these facts until after the trial, and nothing is pointed out by the Attorney General to show how he could have known them by the exercise of more diligence than displayed by him until after Mrs. Dunn, learning of his conviction through the newspapers, advised his attorneys of her knowledge concerning them. This appears to have been his first knowledge of her knowing anything about them. *Mitchell v. The People*, 53 Colo. 479, relied upon by the Attorney General, is not applicable to the facts here. In that case a jury had

disagreed upon a first trial at the April term. Upon a second trial in November, following, the defendant was convicted of the larceny of a steer. Her defense was that the steer bore her brand, and not that of the prosecutor. Her affidavit in support of newly discovered evidence stated that "she now recalls" meeting upon the road, when driving the animal in question, a man whom she did not recognize, but had recently discovered that his name was Beals, etc. In that case the court pointed out that there was no showing of any effort made, before conviction upon the second trial, to discover this witness, and that defendant gave no reason for her failure to recall at an earlier date her meeting with him, etc. In the case at bar, the testimony of Mrs. Lewis discloses an evident intent to clear herself of the transaction. In such circumstances, the defendant could not be charged with lack of diligence in not getting from her information tending to connect her with the commission of this crime or disclosing the identity of others who might furnish testimony showing this fact. Under such conditions, in the absence of testimony to the contrary, it is proper to assume that she would naturally withhold all such information. There is nothing to show that the defendant knew that Mrs. Dunn had any more knowledge on the subject than any other nurse in the city of Denver.

When the record is considered as a whole, we are of opinion that it was prejudicial error to overrule the motion for a new trial on the showing made. This necessitates a reversal of the case.

In view of a new trial, one other error should be considered. The defendant, who it is agreed was a licensed physician, testified that he first met the deceased at the rooms of Mrs. Lewis, who called him over the phone, requesting that he come. Mrs. Lewis was called by the people in rebuttal for the purpose of impeaching the defendant on this question, but when asked concerning it, admitted that she had phoned the defendant as testified by him. Upon his claim of being surprised at the answer and statement,

that he had reason to believe it would be otherwise, the District Attorney was allowed to ask her if a Mr. Young from their office, and Mr. Kamp, the husband of the deceased, had not been at her place the night before. This she admitted. She was then asked, "Q. And did you not there say that you did not phone to Dr. Graff?" Upon objection to this question and argument following, it was not answered and no ruling was made concerning it. That portion of sundry objections made as to cross-examination of the witness upon account of being the people's witness was overruled, but over further objections the District Attorney was allowed to examine the witness pertaining to sundry newspaper advertisements, and compelled her to admit, although reluctantly, that they had been inserted by her. The only doctor mentioned by the witness in connection with these advertisements or her office, to which they referred, was a Dr. Morrison. These newspaper advertisements were such, in our opinion, as would tend to convince any intelligent juror that the witness was engaged in questionable transactions at least, probably in the practice of soliciting abortion cases, possibly in committing them. There was no showing that the defendant was in any way connected with or had anything to do with them, or with the witness, or her offices, other than that he had been called by her the one time as testified to by him. In such circumstances, this so-called testimony was not only improper, but highly prejudicial to the rights of the defendant. When coupled with the fact that the defendant was called by her, it might have caused the jury to give it force as competent testimony tending to establish his guilt. To allow it to stand would be to hold in other cases, for instance where one is charged with the theft of a horse, and gives certain testimony that the people could call a witness in rebuttal to impeach him, and if the witness did not do so, the people could then say, Very well, but for this reason we now propose to show by documentary testimony that in fact you are a horse thief. Such a practice has never been permitted

by this court. In *Moffat v. Tenney*, 17 Colo. 189, the rule, in substance, is laid down that where a party calls a witness he thus, in contemplation of law, recommends him as worthy of credit and can not call other witnesses to directly impeach his general character for truth and veracity, but he is not absolutely bound by his testimony if he can show the contrary to be the truth by other competent evidence.

In *Babcock v. The People*, 13 Colo. 515, 22 Pac. 817, this question is gone into quite fully, wherein, after suggesting sundry conditions in which it might arise, at page 520, the court says:

"Under such circumstances, where a party is really taken by surprise at the conduct of his own witness, it is in the discretion, and is often the duty, of the trial court to allow a party to put leading questions to his own witness, as the only means of preventing an unwilling witness from concealing the truth by unsatisfactory or evasive answers; and in extreme cases, where it is apparent that a witness is giving testimony contrary to the reasonable expectation of the party calling him, such party should be allowed to cross-examine such witness, for the purpose of refreshing his recollection, with the view of modifying his testimony, or of revealing his real *animus* in the case. But while a party should, when the occasion clearly justifies it, be permitted to interrogate by leading questions or cross-examine his own witness, and to ask him if he has not theretofore made other or different statements from those he has just given in evidence, still sound discretion must be exercised, lest the privilege be abused. *Neither upon reason nor authority can a party be allowed to impeach his own witness by showing that his general reputation for truth and veracity is bad in the community where he is known; nor can a party, according to some authorities, be allowed to introduce other witnesses to show that his own witness, at another time, has made other or different statements from those he has given in evidence on the trial.*"

As to this latter declaration, the courts are not in harmony concerning. It is not involved in this record, however, for the reason that neither Mr. Young nor Mr. Kamp were asked concerning what Mrs. Lewis said to them on this subject, but in any event we find no case which approves the doctrine where a witness has been called in rebuttal to impeach the defendant, and declines to do so, even though the answer may be a surprise to the District Attorney; that for this reason he can, through the witness, present irrelevant facts to the issue, which tend to impeach, discredit or besmirch the character of the witness as was permitted in this case. Authorities from other jurisdictions sustaining our line of reasoning and some of which go further are: *State of Kansas v. Keefe*, 54 Kans. 197, 38 Pac. 302; *Hull v. State ex rel. Dickey*, 93 Ind. 128; *Mercer et al. v. State, etc.*, 41 Fla. 279, 26 So. 317; *People v. Jacobs*, 49 Calif. 384.

The judgment is reversed.

Reversed.

Mr. Justice Allen and Mr. Justice Bailey concur.

No. 9046.

HIGHLEY v. THE PEOPLE.

1. **CRIMINAL LAW—Reasonable Doubt.** An instruction which tells the jury that "they have no right to disbelieve as jurors, if they believe as men" is fatal error.
2. — **Information.** An information charged the accused with unlawfully bringing into the state, at a county named, for unlawful purposes, intoxicating liquors. Held sufficient under Rev. Stat. sec. 1950.
The liquors need not be actually delivered to constitute the crime, nor need the information name the person to whom they were to be delivered, nor the purpose or place.
3. **JURY—Functions.** The jury are not judges of the law and fact. White and Teller, JJ.'s, dissent from the conclusion that the information is sufficient.

Allen concurs in that conclusion but dissents to the reversal.

Error to Larimer County Court, Hon. Fred W. Stover, Judge.

Mr. L. D. THOMASON, for plaintiff in error.

Hon. LESLIE E. HUBBARD, attorney general; Mr. RALPH E. C. KERWIN, assistant attorney general, for The People.

Chief Justice Hill delivered the opinion of the court:

THE plaintiff in error was convicted of carrying intoxicating liquors into this state for the purpose of delivering same within the state for unlawful purposes. Numerous errors are urged. The instruction given which requires serious consideration is No. 6, pertaining to a reasonable doubt. It does not follow any form heretofore approved by this court. It includes the following: "You have no right to disbelieve as jurors if you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." This instruction was given on May 26th, 1916. In *Sarkisian v. The People*, 56 Colo. 330, 138 Pac. 26, decided in January, 1914, three members of this court condemned this language, two others not considering it, one member not participating, which left only one, who gave it approval in his dissenting opinion. It is true that quite similar language was reasoned out as harmless upon account of the other language used in *McQueary v. The People*, 48 Colo. 214, 110 Pac. 210, but it was not commended in that case. The same reasoning, with a condemnation of the language used, will be found in *Foster v. The People*, 56 Colo. 452, 13 Pac. 10, decided in January, 1914. The giving of this kind of an instruction was condemned in *VanWyk v. The People*, 45 Colo. 1, 99 Pac. 1009, decided at the September, 1908, term, wherein it was suggested that as this court, in *Minich v. The People*, 8 Colo. 440, 9 Pac. 4, had approved a particular form concerning reasonable doubt, it would recommend its use without further change. It might also be observed that in the VanWyk case the instruction considered included,

"You are not at liberty to disbelieve as jurors if, *from all the evidence*, you believe as men." The words "from all the evidence" are omitted from the instruction under consideration. This omission is one of the complaints here. Regardless of past condemnations of such instructions and recommendations that they be discontinued, the practice apparently has been, by some of the District Attorneys and trial courts, to ignore the recommendations of this court concerning it, evidently because it has been possible, in some cases, to reason out that it was harmless error upon account of other language used.

The question which now presents itself is, shall we ignore our repeated condemnation of this language and our previous suggestions that its use be discontinued, and try again to reason out that the use of it is harmless error even where, as here, the instruction goes farther than any given in the past. In *Robinson v. State*, 18 Wyo. 207, 106 Pac. 24, the judgment was reversed for the giving of this instruction. The same instruction where it contained the language, "from all the evidence" was condemned in *People v. Johnson*, 140 N. Y. 350, 35 N. E. 604; *Siberry v. State*, 133 Ind. 677, 33 N. E. 681, and *Cross v. State*, 132 Ind. 65, 31 N. E. 473. The criticism which we offer to it with the words, "from the evidence," omitted, is that it tells each juror that he is not at liberty to disbelieve as a juror if he believes as a man. A juror might thus construe it as meaning that if, as a man and citizen, from sources outside the record, he believes the defendant guilty, or if that is his belief based on outside knowledge, or otherwise, then it was his duty to convict, even though under oath as a juror from the evidence he would not be thus justified. As said by the Wyoming court, "A lack of evidence to prove such guilt can not be supplied by what a juror knows or believes regardless of his oath. Under our procedure, he is required to base his verdict solely upon the evidence and the law as given him by the court." This rule applies in this jurisdiction. The defendant, in the common parlance of the street, was

charged with what is known as being a bootlegger. In a city the size of Fort Collins, the entire community might believe, as men, that he was guilty of the crime charged. They might base that belief upon sundry matters not disclosed by the record, even though there was no substantial testimony to convict, and when told that they had no right to disbelieve as jurors where they believed as men, is to convey to them the impression that they had a right to convict the defendant, because they believed as men that he was guilty, although as jurors, when compelled to base their finding on the evidence, they would not be justified in arriving at such a conclusion. The cases of *Spies et al. v. The People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320; *Davis v. State*, 51 Nebr. 301, 70 N. W. 984, and *Bartley v. State*, 53 Nebr. 310, 73 N. W. 744, are not applicable to this portion of the instruction under consideration for the reason that in each of those instructions the words "if from all the evidence" were inserted. In the Nebraska cases the language reads, "You are not at liberty to disbelieve as jurors if, from all the evidence, you believe as men." In the *Spies* case the language used reads, "You are not at liberty to disbelieve as jurors if, from the evidence, you believe as men." We might also suggest, as was pointed out by the Wyoming court, that in Illinois the instructions to the jury are advisory only; the jury remain the judges of the law and the facts. See Vol. 11, Encyc. Pl. & Pr. 67-68, and cases there cited. Such is not the case here, for which reason an instruction might be reasoned out there as harmless when we would not be justified in reaching the same conclusion here. The giving of this instruction was prejudicial error. This necessitates a reversal of the judgment.

In view of a new trial, one other alleged error should be considered. It is claimed that the information is defective, and, upon defendant's motion, should have been quashed for the alleged reasons: First, that it fails to state the place within this state to which the liquors were carried.

Second, that it fails to state that the liquors were carried into Larimer County. Third, that it fails to state any particular place or point in Larimer County to which the liquors were carried. Fourth, that it fails to state the particular purpose for which they were carried. Fifth, that it fails to state the particular place where they were delivered. And sixth, that it fails to state the particular purpose for which they were to be delivered. The information states "that at the County of Larimer and State of Colorado." This disposes of objections 1 and 2. It further states that intoxicating liquors, to-wit: beer, was carried into this state for the purpose of delivering the same within the state for unlawful purposes, contrary to the form of the statute, etc. This disposes of objections 4 and 6. It does not state any particular place in Larimer County to which they were carried, or the particular place in that county where it was delivered. For these reasons, it is urged that it fails to inform the defendant of the nature and cause of the accusations against him as required by section 16, article II, of the Constitution. We can not agree with this contention. The information is practically within the language of the statute. Section 1950, Revised Statutes 1908, declares that every indictment of a grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the criminal code. By a later act this section applies to informations. It was intended to mean something more than a recognition of the general rule then in force; otherwise, there was no necessity for its passage; hence, if we are to give any effect to it, we must accept it as meaning what it says and apply it to all informations except where in so doing it fails to give the defendant the nature and cause of the accusation as required by the Constitution. In our opinion, this information gives to the defendant this knowledge.

In *Langan v. The People*, 32 Colo. 414, 76 Pac. 1048, the court had under consideration an act prohibiting the sale of intoxicating liquors within five miles of any camp of

twenty-five or more men engaged in the construction or repair of any railroad, canal, reservoir, or public work. The information charged the offense in the language of the statute (stating in general terms that the liquor was sold on or about March 17th, 1903), in the County of Gilpin and State of Colorado. The place of sale is not otherwise stated, nor is the name of the person to whom the liquor is alleged to have been sold. It was held that as the gravaman of the offense charged was a sale made to a person belonging to a protected or prohibited class, that the name of the purchaser is not material. It was also held, that the failure to state the name of the grading camp was not a fatal error, which required the reversal of the cause; that the scheme of the statute was to prohibit generally the sale of intoxicating liquors within five miles of a grading camp; that while it included certain exemptions in its prohibition, it was not necessary to allege that the defendant was not of the exempted class. This reasoning applies to the statute under consideration; one of its objects is to prohibit any one from carrying intoxicating liquors into this state for the purpose of delivering the same to any person, company or corporation within this state, except for lawful purposes. In such circumstances, we see no reason why the information should go beyond the language of the act. The gravaman of the offense charged is the carrying of the intoxicating liquors, to-wit: beer, into the state for the purpose of delivering same within this state for unlawful purposes. The liquors need not be delivered in order to constitute the crime, but must be brought into the state for that purpose; hence, under the ruling in the former case, the person to whom they were to be delivered is immaterial; likewise, the exact place of carriage into the state is immaterial. It is alleged to have been in Larimer County; that is sufficient.

The case of *Fehring v. The People*, 59 Colo. 3, 147 Pac. 361, presents a different state of facts. The defendant was a druggist. The act under consideration provided a scheme whereby any city, town, ward, district or precinct in the

state might become anti-saloon territory. Section 10 made it unlawful to sell liquors in such territory, except as provided in the act. Section 14 permits licensed pharmacists to sell such liquors for medicinal purposes upon written prescription of a physician, and Section 15 makes the defendant liable if any unlawful sale was made, by himself or otherwise, either as principal, clerk or servant, directly or indirectly, contrary to the provisions of the act, etc. It provides a greater punishment for the second offense. In such circumstances, it was held that the general and incomprehensive language of the charge gave the defendant but little knowledge of the particular case against him, which the prosecution expected to establish by proof, and that in preparing his defense, based upon such charge alone, he had nothing but conjecture to guide him. It was further pointed out that as the statute expressly authorizes the sale of intoxicating liquors within anti-saloon territory by licensed druggists on prescription, that this furnished an additional reason why it was essential to practically identify the alleged crime; that, as the defendant was a licensed pharmacist, and, by the production of a prescription from a physician upon which the sale was made, he could secure immunity against any groundless prosecution, but how could he know what prescription to produce unless furnished the name of the purchaser.

In *Sturgess v. State*, 3 Okla. Crim. 375, 102 Pac. 57, the opinion states that the defendant was convicted under an information charging him with transporting and conveying intoxicating liquors from one place in the state to another place in the state, but not designating such places. In such a case, it might properly come under the ruling announced in *Fehringer v. The People*, supra, as well as the mandate in our Constitution that the defendant be informed of the nature and cause of the accusation. Such is not the case here, but, to the contrary, the language used notified the defendant that he is charged with bringing liquors from without the state to within the state and within the County

of Larimer, etc., at a certain time, for unlawful purposes. This was sufficient to advise him of the exact crime charged. The reasoning in *People v. Williams*, 61 Colo. 11, 155 Pac. 323, also tends to sustain this conclusion.

For the reasons stated, the judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

Decision *en banc*.

Mr. Justice White and Mr. Justice Teller concur on the reversal for the reasons given, but dissent from the conclusion that the information is sufficient.

Mr. Justice Allen dissents to the reversal of the judgment for the reasons given, but concurs in the conclusion that the information is sufficient.

No. 9114.

WATER SUPPLY & STORAGE COMPANY v. LARIMER & WELD
RESERVOIR COMPANY.

WATER RIGHTS—Change of Place of Storage. An irrigation company applying for leave to change the place of storage of certain waters which have been adjudged to it, has the burden of showing that no substantial invasion of the rights of others will result from the proposed change.

Where the testimony is in conflict an order denying the application will be affirmed.

Error to Larimer District Court, Hon. Neil F. Graham, Judge.

Mr. T. J. LEFTWICH, Mr. L. R. TEMPLE, for plaintiff in error.

Mr. CHARLES D. TODD, Mr. CHARLES E. SOUTHARD, Mr. DELPH E. CARPENTER, Mr. L. R. RHODES, for defendants in error.

Mr. Justice Bailey delivered the opinion of the court.

THIS proceeding was brought in equity by The Water Supply & Storage Company, against all other water users

in Water District No. 3, to obtain a decree for a change of the place of storage of certain waters, to the use of which it was entitled for irrigation.

The petitioner is the owner of two reservoirs, known respectively as Long Pond Reservoir and Black Hollow Reservoir, both in Water District No. 3. It sought a decree allowing it to change its storage right in Long Pond Reservoir to Black Hollow Reservoir. After a full hearing, the application was denied, and the petition dismissed, and petitioner brings the record here for review.

The case was brought upon the theory that the matter was one for equitable relief. The question as to whether the proceeding should not have been brought under the general adjudication statute was raised below by demurrer. In our view of the matter it is not necessary to determine that question.

It appears that the water decrees in District No. 3 are dependent upon the water in the Cache la Poudre River, the available flow of which fluctuates with different seasons from fifty cubic feet per second to one hundred and twenty-five cubic feet; and that by reason of the exchange of water for irrigation among various appropriators, the rights of water users are unusually complicated and interrelated. The basic question to be determined, therefore, is not whether this suit should have been in law, in equity, or under the statute, but whether the granting of the relief sought, in any proceeding, would work injury to other appropriators. Regardless of the form of action, the burden is upon petitioner to establish the fact that no substantial injury to the vested rights of others would result from the proposed change. That is the only issue involved. All parties presented expert and lay testimony, and after the case had been closed, petitioner was allowed to reopen it, for the purpose of producing more testimony relative to the effect of the proposed change upon the rights of others. The evidence was conflicting, and the findings of the court were adverse to petitioner.

The matter must be disposed of under the well established rule, recently reaffirmed in *Lee v. Gunby*, (Colo.) 171 Pac. 1145, where this court, at page 1146, said:

"The conclusion reached by the trial court is based upon and supported by the testimony adduced. Much of it, especially as to the controlling points, was in direct conflict, and the court resolved the issues in favor of Gunby. There is nothing in the record, either of law or fact, which necessitates a different conclusion. It is well settled that upon conflicting testimony a judgment will not be disturbed if there is sufficient evidence to support it."

The findings of the trial court are supported by competent testimony; indeed, we think by a clear preponderance thereof; and there is nothing in the record, either of law or fact, which requires any change or modification of its conclusions. The judgment is accordingly affirmed.

Judgment affirmed.

Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9175.

KETTELHUT v. EDWARDS.

1. FALSE IMPRISONMENT—*Evidence*. One claiming to be a city detective called upon plaintiff, told her he was a detective, had a complaint against her, and was told to get her, that he could put her in jail, but would take her to where she might meet the man who made the complaint. He ignored her protests of innocence, and insisted that she go with him. Held an arrest and false imprisonment.
2. — *Ratification of Arrest*. One who approves an unlawful arrest made by another is liable to an action for false imprisonment.

Error to Denver District Court, Hon. Charles Cavender, Judge.

Department One.

Mr. JOSEPH D. PENDER, Mr. CON. K. O'BYRNE, for plaintiff in error.

No appearance for defendant in error.

Opinion by Mr. Justice Teller.

THE plaintiff in error brought suit against defendant in error to recover damages for false imprisonment, and a verdict was directed for defendant.

The judgment entered on said verdict is now alleged to be erroneous because of the direction of the verdict.

The only question to be considered is whether or not plaintiff's evidence, with all legitimate inferences, proved the allegations of the complaint which were necessary to make out a case for damages.

The complaint alleged that the defendant complained to the police authorities of the City of Denver that plaintiff, after occupying a room with him for a night, had robbed him; that he procured one Bramer, a detective in the employ of said city, to arrest defendant, on said complaint, without a warrant, and without probable cause; that plaintiff was arrested and taken by said Bramer to the office of an attorney in said city; that she was required by said Bramer, at the instance of the defendant, to return to said office on the following day; and that all of said acts were done under threats to put plaintiff in jail.

Plaintiff testified that on the day of the alleged arrest, Bramer came to her room; told her he was a city detective; that he had a complaint against her from David Edwards; that he was told to get her; that he could put her in jail, but would make it easy for her and take her to an attorney's office, where they would meet the man who made the complaint. Plaintiff further testified that Bramer ignored her protests and offer to show by her roommate or the landlady that she was not the person wanted, and insisted that she go with him; that she went to the said office; and that Edwards, when he saw her, declared she was not the woman who had robbed him, whereupon Bramer told her she was released.

This constituted an arrest and false imprisonment: *Callahan v. Searles*, 78 Hun. 238, 28 N. Y. Supp. 904.

"False imprisonment consists in imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion. *Prima facie* any restraint put by force or fear upon the actions of another is unlawful and constitutes a false imprisonment, unless a showing of justification makes it a true or legal imprisonment." Cooley on Torts, 3rd Ed., Vol. 1, Page 296.

This leaves for consideration the question of defendant's responsibility for the arrest.

It can not be said that there was direct evidence to prove the filing of a complaint, or the ordering of plaintiff's arrest, though, if Bramer's official character had been established, his statements might, under some authorities, have been received as part of the *res gestae*: 11 R. C. L., p. 822; but there is evidence which would clearly justify an inference that defendant was the cause of said arrest. Accepting as true, as we must, for the purpose of determining the correctness of the direction of a verdict, the testimony of the hotel keeper, it appears that the defendant, on the morning of May 6, the day of the arrest, obtained from the witness the name of plaintiff; that in the afternoon of that day Bramer came to the hotel, asked for plaintiff by name, and was sent to her room. Later that day defendant came to the hotel and said: "I got her, * * * I will fix her; I will put her where the dogs won't bite her." Calling plaintiff: "Kettelbum." He came there the next day three times, repeating substantially his language as above stated.

This is evidence of a ratification of the arrest; and ratification of the arrest would make defendant as responsible for it as would evidence that he directed the arrest. *Cordner v. Railroad*, 72 N. H. 413, 57 Atl. 234; *Fenelow v. Butts*, 53 Wis. 344, 10 N. W. 501, and 19 Cyc. 327.

Plaintiff testified as to the effect of the treatment, to which she had testified, upon her health, and if the jury believed her, they would be justified in giving her some damages.

A case for the jury was made, and the court erred in directing a verdict for defendant.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

Chief Justice Hill and Mr. Justice White concur.

No. 9188.

NOBLE ET AL. v. THE PEOPLE ET AL.

1. INTOXICATING LIQUORS—*Forfeiture of*. There is no authority in law for the destruction of intoxicating liquors found in possession of, and claimed by, a citizen, by judgment of forfeiture, without trial.
2. — *Burden of Proof*. The people, seeking condemnation and destruction of intoxicating liquors, have the burden of showing that the liquors were kept for an unlawful purpose. Only where the evidence warrants a finding of all the facts necessary to constitute a forfeiture, is the property right in the liquors forfeited.
3. — *Liquors Acquired before the Statute took Effect*, and stored in a private house, having no connection with, or used as, a store, shop, hotel, boarding house, rooming house, or place of public resort, are not, in view of the exceptions contained in the statute, to be regarded as kept for an unlawful purpose, merely by reason of the excessive amount or quantity thereof.
4. PLEADINGS—*Motion for Judgment Upon*. Proceeding to condemn and destroy intoxicating liquors. The defendant pleaded purchase before the taking effect of the prohibitory act (Laws 1915, c. 98), for their personal use, and that they stored the liquors in the private residence of one of them, no part of which was connected with or used as a store, shop, hotel, boarding house, rooming house, or place of public resort. Motion for judgment on the pleadings admits these allegations and the allowance of the motion was held error.

The purpose of the action being to secure the condemnation and destruction of certain intoxicating liquors, two citizens claiming the liquors were named as defendants. Although the only judgment prayed was the destruction of the liquors, the case was tried as an action of replevin. The court says that if again tried as an action of replevin, without reforming the pleadings, the individual claimants of the liquors should be treated as plaintiffs; that if the evidence should warrant a

finding of fact that the property in the liquors had been forfeited under the statute there could be no recovery by the individual claimants, because in the case supposed, they would have no title or right of possession, and they recover only upon the strength of their own title; that if the liquors were shown to be placed in the private residence of one of the defendants before the prohibitory statute went into effect, and there remained, and that the house was within the exception mentioned in the statute, the quantity of liquor would be no evidence of violation of the statute; and finally that although the package was not marked as containing intoxicating liquor, while being removed by one of the claimants from the place of deposit to his own private residence, this would not work a forfeiture.

Error to Adams District Court, Hon. J. C. Wiley, Judge.

Mr. F. T. JOHNSON, Mr. S. H. JOHNSON, for plaintiffs in error.

Mr. SAMUEL W. JOHNSON, District Attorney, and Mr. CHARLES E. FRIEND, for defendants in error.

THIS action was brought in the District Court of Adams County to defeat any property right in, and to destroy, certain intoxicating liquors seized by and now in the possession of plaintiff below, and is based upon the intoxicating liquor act of 1915.

Some time prior to January 1, 1916, and before the prohibition act went into effect, William Noble, who resided in Denver, took 122 pint bottles of whiskey, and 23 cases each containing 24 pints of whiskey, belonging to him, to the residence of Al Duncan, in Adams County, and placed the liquor in a room in the house where Duncan lived. There is no proof or admission that any part of Duncan's residence was in connection with or used as a store, shop, hotel, boarding house, rooming house or place of public resort. Duncan owned 4 barrels of whiskey which he placed in the same room prior to January 1, 1916.

May 16, 1916, Noble drove with a horse and buggy from his residence in Denver to Duncan's place, and took from the room the 122 bottles of whiskey, which he placed in his buggy, with the intention of taking it to his residence in

Denver. There is no evidence as to how the whiskey was packed, or that it was packed, except that it was in pint bottles, and the package was not labeled, "This package contains intoxicating liquor." While traveling on the highway in Adams County, going to Denver, he was met by the sheriff, who arrested him, searched the buggy, and took therefrom the whiskey, and deposited Noble and the liquor in the County Jail at Brighton, without writ or search warrant, or any legal proceedings. The next day, May 17th, the sheriff, armed with a purported search warrant from a justice of the peace, which it is claimed was void, searched the Duncan residence, and found the 4 barrels of whiskey, and the 23 cases, and took the liquor to Brighton, and deposited it in jail as illegal liquor. No return was made on the search warrant, and no further proceedings were had, regarding the liquor seized at the Duncan ranch, before the justice who issued the warrant.

The next day after searching Noble's buggy, the sheriff filed two criminal complaints against him in the County Court, one charging him with unlawfully selling and keeping for sale the liquor taken from the buggy, and the other charging him with carrying it from one point to another in the state without the package being marked, "This package contains intoxicating liquor." Upon the former charge Noble was tried by a jury and acquitted, but upon the latter he was convicted June 24, 1916, and the court fined him \$100.00 and costs, which he paid, and was discharged. No further or other court proceedings were had, and no court orders were entered in the Justice Court, or in the County Court, or elsewhere, regarding the liquor. All the liquor taken remained in the sheriff's custody, without any steps being taken to destroy it until September 1, 1916, when the District Attorney filed a complaint against the liquor in the District Court at Brighton in a proceeding entitled, "The People of the State of Colorado, Plaintiff, v. Al Duncan and William Noble, Defendants." The complaint charges *inter alia* that the liquors were in the possession of

and kept by Duncan and Noble for unlawful sale; that the 122 bottles were taken from Noble's buggy when they were being transported by him from one point to another within the state, without the package being labeled, "This package contains intoxicating liquor." It asks for a finding that the liquors are unlawful, because they were kept by defendants for sale; and for a final judgment that defendants have no property rights in the liquors, and that the sheriff be directed to destroy the same.

An ordinary code summons was issued, stating that the action was brought to defeat any property right defendants had in the liquors, and to destroy the same. Copy of this summons and complaint was served on Duncan, but Noble was never served. Duncan answered September 28th, and admitted the sheriff seized and took all the liquor, except the 122 bottles, from his private residence, on his farm, in Adams County, and denied all the other allegations. In what he calls a second defense and counter-claim he alleges that he owns the 4 barrels of whiskey; that, before the prohibition act went into effect, he stored and kept it in the room in his private residence, for his own private use, and not for sale, no part of which is in connection with or used as a store, shop, hotel, boarding house, rooming house or place of public resort; that the sheriff seized and took the liquor from this room in his private residence; that the value of the liquor is \$600.00; and he prays that the liquor be not destroyed, but returned to him.

January 4, 1917, Duncan filed a motion to dismiss the case on account of the procedure adopted, claiming that sections 11, 12 and 13 of the act should have been followed, instead of the procedure adopted. This motion was argued and overruled, and by stipulation in open court, the sheriff was made a party plaintiff. The case against Duncan and the liquor claimed by him went to trial before a jury, and January 6th it returned into court the following verdict:

"We, the jury, duly impaneled and sworn to try the issues herein joined between plaintiffs and defendant Duncan, find the issues for the defendant Duncan."

January 10th plaintiffs filed a motion praying the court, notwithstanding the verdict, to enter judgment against Duncan on the pleadings, or to grant plaintiffs a new trial. February 15th, after argument, the court granted plaintiffs a new trial. On the 17th, after still further argument on the motion, the court sustained plaintiffs' motion for judgment on the pleadings. Plaintiffs then filed the following motion:

"Come now the plaintiffs and move the court to enter an order herein, commanding and directing the sheriff of Adams County to forthwith destroy the liquors described in the complaint herein, for the reason the pleadings herein show that the defendants, nor either of them, have any property rights of any kind whatsoever in the liquors, or any part thereof."

Noble then filed a motion, supported by his affidavit, to the effect that he owned the 122 bottles and 23 cases of liquor; that he purchased it for his own private or personal use, and not for sale, before the prohibition law went into effect, and conveyed it to the Duncan ranch and stored it in this room in Duncan's private residence; that it was not imported into the state after the act went into effect, nor placed in packages for shipment, nor shipped to him or any one, for any purpose thereafter; that, while he was taking the 122 bottles to his residence in Denver, the sheriff of Adams County suddenly came upon him in the highway, arrested him, and took possession of the liquor, and conveyed and deposited him and the liquor in the County Jail, without a warrant; that the next day the sheriff filed against him a criminal complaint in the County Court, in which he charged him with unlawfully selling and keeping for sale the liquor, and filed another complaint against him, in which he charged that he unlawfully carried the liquor from one point to another within the state without the package being labeled, "This package contains intoxicating liquor"; that criminal informations were filed against him on these complaints, and June 3, 1916, he was acquitted by

a jury on the first charge, but convicted on the second and fined \$100.00 and costs, which he paid, and was finally discharged, but that the liquor was not condemned, nor was it delivered to him, but was kept by the sheriff; that the court made no order whatever regarding the liquor; that the law, under the circumstances, did not require the package to be marked, "This package contains intoxicating liquor"; that it is of the value of \$50.00, and that he desires it returned without further delay or litigation. Regarding the 23 cases, he says that the search warrant issued by the justice was void, and the sheriff made no return thereon, and nothing was ever done with that liquor except to keep it; that it is worth \$250.00, and he wants it returned; that none of the liquor is held by the sheriff for the purpose of evidence, and that no case is now pending against any person regarding the liquor, nor against the liquor, except the present proceeding; that none of the liquor was imported into the state after the prohibition act of 1915 went into effect, and none of it was ever placed in packages for shipment, or shipped, after the prohibition act went into effect; and that all of it is his property, and was kept for his private and personal use, and not for sale.

The court overruled Noble's motion and sustained plaintiff's motion to destroy the liquor. Duncan and Noble each filed separate motions for a new trial, which were overruled, and February 17, 1917, the court entered the following judgment:

"It is, therefore, ordered, adjudged and decreed by the court, that the liquors described in the complaint herein are unlawful, and the Sheriff of Adams County is hereby directed and ordered to forthwith destroy the said liquors and the vessels in which said liquors are contained and make due return thereof to this court and the plaintiffs recover their costs."

It is claimed that the court erred in sustaining plaintiffs' motion and entering judgment on the pleadings; that the ruling of the court in ordering the liquor destroyed in the

face of defendants' pleadings is arbitrary and in disregard of defendants' rights, and that the method of procedure adopted by plaintiffs is unwarranted by the prohibition statute of 1915; and that the court was without jurisdiction in the premises.

The applicable sections of the statute may be summarized as follows:

Sec. 1. No person shall, within this state, manufacture for sale or gift any intoxicating liquors. No person shall import into this state any intoxicating liquors for sale or gift. No person shall, within this state, sell or keep for sale any intoxicating liquors, or offer any intoxicating liquors for sale, barter or trade.

Sec. 7. Provides it shall be unlawful for carriers to carry liquor into the state, or from one point to another within the state, for the purpose of delivering it to any person, or to deliver it to any person for any purpose prohibited by the statute. The carrier shall, within three days after the first of each month, file with the County Clerk of the county where the liquor is delivered to the consignee, and with the Secretary of State, a statement covering the preceding month, setting forth the date of delivery, name and post-office address of each consignee and each consignor, the place of delivery, and the person to whom it is delivered, and pay the County Clerk a fee of 25 cents for each shipment so delivered.

Sec. 8. Makes it unlawful for the carrier to deliver any liquor to any person other than the consignee, or to the consignee, until he first pays a fee of 25 cents and executes an affidavit giving his true name and postoffice address, and stating that he is the consignee named in the shipment to whom the package containing the liquor is addressed, and that the liquor so consigned to him is for his personal use, or for mechanical or sacramental purposes. The person delivering the liquor may administer the oath to the consignee when he receives the package. The delivering agency must keep the affidavit open to public inspection for two years.

Sec. 9. Makes it unlawful for any person to open the original package while in transit, and until delivery to the consignee, or for the carrier to allow the original package in which the liquor is being shipped to be opened or divided, while the same is upon the premises or in the possession of the carrier.

Sec. 10. Makes it unlawful for any person or carrier to ship, or knowingly carry, to any point in the state, or from one point to another within the state, any liquor, without marking conspicuously on the package containing the liquor being shipped these words: "This Package Contains Intoxicating Liquor."

Sec. 11. Provides, if any person makes an affidavit before a court that he has reason to believe that liquors are being sold or kept for prohibited purposes, describing the premises or place to be searched, the court or judge shall issue a search warrant, in the form set forth in the statute, directed to such officer as the person making the affidavit shall designate, commanding him to search the premises or place.

Sec. 12. Makes it the duty of the officer executing the warrant, if intoxicating liquors are there found, to seize and safely keep the same, and make immediate return on the warrant to the court that issued it, and to forthwith file a criminal complaint in the court issuing the warrant, charging the person with such violation of law as the evidence in the case justifies. The liquor must be held by the officer seizing it, subject to the order of the court that issued the warrant, as evidence in the prosecution of the criminal case against the person charged with violating the law, and can not be taken from the custody of the officer by replevin, or other processes, while such criminal proceedings are pending, and a final judgment of conviction against the person charged shall be a bar to any suit for the recovery of the liquor seized, or its value, or for damages by reason of the seizure or detention thereof, and judgment in such a case shall be entered, finding the liquors unlawful and

directing the destruction thereof by the officer. If the officer finds no person in possession of the premises where the illegal liquors are found, he must post in a conspicuous place on the premises a copy of the warrant, and if, at the time fixed for the hearing, or 30 days thereafter, no person appears, the court shall order the liquor destroyed. No warrant shall issue to search a place occupied as a private residence unless it, or some part of it, is used in connection with or as a store, shop, hotel, boarding house, rooming house or place of public resort.

.Sec. 13. Provides, any officer having personal knowledge or reasonable information that intoxicating liquors are kept in violation of law in any place, except a private residence, as in section 12 provided, shall search the suspected place without a warrant, and without any affidavit being filed, and, if he finds upon the premises intoxicating liquors, he shall seize the same, and arrest the person in charge of the place, and shall take him, with the liquors so seized, forthwith before a justice of the peace or judge having jurisdiction to try cases for a violation of the act, and shall, without delay, make and file such a criminal complaint as the evidence justifies against the person arrested.

Sec. 20. Provides there shall be no property rights of any kind whatsoever in any liquors kept or used for the purpose of violating any provision of the act.

Sec. 21. Provides, that in all prosecutions against any person for violating the act, the finding of an unusual amount of intoxicating liquor in the possession of any one not authorized under the act to sell it, except when found in a private residence, no part of which is in connection with or used as a store, shop, hotel, boarding house, rooming house, or place of public resort, shall be *prima facie* evidence of the violation by the person of the applicable section or sections.

Sec. 22. Provides, if any person shall violate any of the provisions of the act, he shall, for the first offense, be deemed guilty of a misdemeanor, and, for every subsequent

offense, of a felony, and in each case shall be punished upon conviction in the manner provided by the statute.

Sec. 25. Provides, that Justices of the Peace and County Courts shall have jurisdiction over all violations of the act which are declared to be misdemeanors, and that the District Court shall have jurisdiction over all violations of the act.

Garrigues, J., after stating the case as above:

This proceeding was brought originally under the Prohibition Act, S. L. 1915, p. 275, against certain intoxicating liquors, the avowed purpose being to defeat any property rights therein, and to obtain a rule of court ordering them destroyed. Duncan and Noble were made defendants because they claimed to own the liquor that was taken from their possession. The prohibition act, which took effect January 1, 1916, is controlling.

Designating the parties, as in the court below, plaintiffs and defendants, plaintiffs claim the liquor was kept for sale, and they ask to have the property rights therein declared forfeited, and have it destroyed under a court order. Plaintiffs also contend, though the proceeding is to declare a forfeiture, that no action, suit or legal proceeding is necessary to work a forfeiture; that the statute itself works a forfeiture immediately upon the happening of the event. The rule of forfeiture contended for no doubt is true, but how shall it be known that the event happened, or that forfeiture has occurred unless the acts occasioning the forfeiture appear in court, or in some legal manner or proceeding.

In *McConathy v. Deck*, 34 Colo. 461, 466, 83 Pac. 135, 4 L. R. A. (N. S.) 358, 7 Ann. Cas. 896, and the many citations and quotations therein, the principle is announced that forfeiture takes place immediately, under the statute, without any proceeding to declare a forfeiture, upon the happening of the event; still, in all forfeiture cases that we have been able to examine, the facts constituting the forfeiture were made to appear in court, before the forfeiture

could be pronounced or made effectual. The owner of the property must be afforded the means of demanding and enforcing his constitutional right to defend and protect his property against forfeiture. In all cases where the rule has been announced, it has been in court, where the owner had the opportunity to defend his property rights. If we concede section 20 of the statute warrants such a proceeding, the property rights of defendants could only be defeated by proof, on the trial, of facts constituting a forfeiture. A forfeiture, under the circumstances, could not be declared upon default without any evidence.

Plaintiffs claim they were not obliged to make a *prima facie* case, or to introduce any evidence of forfeiture in the first instance, because defendants, by their pleadings, made a *prima facie* case for plaintiffs, entitling them to judgment on the pleadings, but this contention is untenable. Noble's affidavit treated as a pleading put in issue the alleged facts, it set out his version of the transaction, the effect of which was a denial. Duncan's answer was a denial except he admitted the liquor belonged to him, and that it was seized and taken from his possession. The cross-complaint set out his account of the transaction, and amounts, like Noble's affidavit, to a denial. It added nothing and was superfluous—because he styled it a cross-complaint is of no consequence. Both Duncan and Noble attacked the form of procedure, and denied the alleged facts which it is claimed forfeited the property rights. No proof was offered, and defendants were given no opportunity to defend whatever property right they had in the liquor. To destroy property taken from the possession of defendants, and which they claim to own, by pronouncing judgment for forfeiture on the pleadings without evidence, was without authority of law.

It was not an adversary proceeding, and possibly pleadings on behalf of defendants were unnecessary, but they were permitted to plead they purchased the liquor before the state went dry, and stored it in a room in Duncan's pri-

vate residence, no part of which was connected with, or used as a store, shop, hotel, boarding house, rooming house, or place of public resort, for their own personal and private use. The motion for judgment on the pleadings admitted the truth of these allegations. If true, it came within the exception mentioned in the statute, and the amount seized was not, on account of the exception, *prima facie* evidence of a violation of the statute. The burden was upon plaintiffs to show by evidence on the trial that the liquor was kept for unlawful purposes, and judgment on the pleadings was wrong.

For this reason the case will be reversed and remanded.

2. The proceeding, as originally brought, is an action *in rem* against certain liquors, but it seems the court below and the parties at the trial treated and tried it as a replevin suit. We express no opinion as to the propriety of such a course. If the case is re-tried, it will be open for the parties and the court to make up and try the issue as they may be advised. But, in view of such an event, we feel we should express an opinion on certain points that may arise, to aid the court in the future trial of the case.

If it is tried as it was brought, and the evidence warrants the finding that defendants have no property rights therein, on account of forfeiture under the statute, then, whether the seizure of the liquor was legal or illegal, or what plaintiffs did with it thereafter, or what the court orders done with it, is of no concern to defendants, because they have no property rights therein. But it is only in the event that the evidence warrants a finding that the facts necessary to constitute a forfeiture are true, that the property rights in the liquor are forfeited. Therefore, on the trial of this issue, plaintiffs have the burden of proving from all the evidence in the case the allegations of forfeiture. If defendants' property rights are forfeited, then they have no further interest in the liquor, and all other questions, except forfeiture, are immaterial.

If the case is converted into and tried as a replevin suit without reforming the pleadings, then Duncan and Noble should be treated as plaintiffs, and Duncan's answer and Noble's affidavit should be treated as complaints in replevin. Plaintiffs, in that event, should be treated as defendants, and the complaint should be treated as an answer in replevin, and the parties would be entitled to a jury trial as in any replevin suit. In the trial of such an issue, if the whole evidence warrants a finding of fact that plaintiffs' property rights have been forfeited by the statute, they cannot recover in replevin because they have no title and right of possession; they must recover upon the strength of their own title and not upon the weakness of defendants' title. The defense of forfeiture of title raised in such a case would be a good defense in replevin.

If the evidence on the trial shows the liquor was placed in a room in Duncan's private residence (prior to the time the act went into effect, and was there when it went into effect) no part of which was in connection with or used as a store, shop, hotel, boarding house, rooming house or place of public resort, then, on account of the exception mentioned in the statute, it cannot be said that the amount was *prima facie* evidence under the statute that it was kept or used for the purpose of violating the statute.

Because Noble did not have the 122 bottles of liquor taken from his buggy labeled— "This package contains intoxicating liquor"—did not, under the circumstances of this case, work a forfeiture under the statute of whatever title he had in the liquor.

Reversed.

Decision *en banc*.

Mr. Justice Bailey not participating.

Mr. Justice Teller and Mr. Justice Allen agree in the conclusion of reversal only.

No. 9193.

SAWYER, ET AL. v. HEADCAMP PACIFIC JURISDICTION WOODMEN OF THE WORLD.

BENEFIT SOCIETY—Change of By-Law—Retro-active Effect. A change in the by-laws of a benefit society is not to be construed as operating retroactively, uness specifically extended to prior contracts.

Error to Jefferson District Court, Hon. J. C. Wiley, Judge.

Messrs. QUAINANCE, KING & QUAINANCE, for plaintiffs in error.

Mr. GEORGE P. STEELE, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court.

PLAINTIFFS brought suit to recover under a certificate of insurance issued by the Head Camp Pacific Jurisdiction, Woodmen of the World, upon the life of George W. Sawyer, naming them as beneficiaries. Defendant, a fraternal insurance corporation operating under a lodge system, issued the certificate in 1900. Sawyer died in January, 1914. Defendant denied liability under the certificate on the ground that deceased was in arrears in payment of his assessments at the time of his death. Trial was to the court and findings were for the defendant. Plaintiffs allege error and bring the cause here for review.

When Sawyer became a member of the organization in 1900 its constitution contained the following provision:

"Any benefit member of any camp who, while in good standing, becomes sick or disabled, and on account thereof is unable or finds it difficult to continue payment on benefit assessments and camp dues, during such illness or disability, may, nevertheless, continue to be in good standing on the following terms, and not otherwise, viz:

"Prior to becoming delinquent, he shall notify the clerk of his camp of his illness or disability and consequent desire that the camp maintain him in good standing, and deliver to said clerk the certificate of a physician concerning

his said illness and the nature thereof; thereupon the clerk, on being satisfied that such illness or disability exists, shall inform the counsel commander and banker thereof. In such cases, the member, until he recovers from the illness or disability, shall not be required to pay his camp dues, but during such time the *per capita* tax due on account of said member of the Head Camp shall, from month to month, be remitted to the head camp from the general fund of the camp, and during each month for which assessments are called, a warrant shall be drawn on the general fund of the camp, payable to the clerk for its benefit fund, to pay the assessments due from sick or disabled benefit members. To obtain the benefit of this section, a member must give notice to the clerk before he becomes delinquent, except in such extraordinary cases of sudden illness or accident to a member in good standing which renders it impossible for the member to give notice before becoming delinquent."

In 1910 the above section was repealed and the following adopted:

"Any benefit member of any camp who, while in good standing becomes sick or disabled and on account thereof is unable to pay his dues or assessments, he shall send or cause to be sent to the clerk of his camp notice in writing of said disability prior to becoming delinquent, thereupon the clerk, on being satisfied of such disability shall inform said camp, which shall keep said neighbor in good standing during said disability, but not to exceed three months."

The benefit certificate issued to Sawyer contained the following provision:

"This certificate is hereby made expressly subject to all conditions endorsed hereon, and are made a part hereof, and also to all conditions named in the constitution of said association and the by-laws of said camp. It shall not be in force at any time when said member stands suspended and is not in good standing, pursuant to said constitution and by-laws now in force, or hereafter regularly adopted and in force at the time of his death."

It appears that Sawyer kept his lodge dues and assessments paid from the time he became a member in 1900 until August, 1913. At about that time he became insane, and remained in that condition until he died, in January, 1914. The clerk of the local camp of which Sawyer was a member was duly notified of the condition of the insured; and as far as the abstract is concerned, there is no evidence that the head camp did not receive from the local camp all assessments due on account of the certificate under consideration.

The only question to be determined is whether the amendment to the constitution in relation to payment of assessments by local camps may be considered to have a retroactive effect, in view of the stipulation in the insurance contract as set out above.

A careful reading of the cases cited by both parties discloses a sharp conflict of opinion. In a summary of authorities in 29 Cyc. 72, it is said:

"The rule that statutes will be construed as operating prospectively only unless it is clear that the legislature intended them to operate retrospectively applies to statutes relating to beneficial associations; and apart from this they cannot be given a retrospective operation if, thus operating, they would interfere with vested rights or impair the obligation of pre-existing contracts. A like rule applies to alterations made in the constitution and by-laws of a society whether by amendment, or repeal of existing provisions or by the enactment of new provisions. Accordingly such alterations will be given a prospective operation unless it clearly appears that they were intended to operate retrospectively; and even where a retrospective operation was intended, the alterations do not govern the rights and liabilities of pre-existing members and their beneficiaries if vested rights would thereby be defeated, or the obligation of contracts be impaired."

In discussing the same question, 19 R. C. L. 1213, is as follows:

"As a general rule, amendments to the constitution and by-laws of benevolent and beneficial associations will be construed as operating only on cases or facts that come into existence after their adoption, and will not be interpreted to be retroactive in their effect unless by their terms it is perfectly manifest that they were intended to be so. While a member in making a contract may agree with the association that he will be bound by the constitution and by-laws existing at the time the agreement is made and by any law that may thereafter be legally adopted, he is entitled to rely upon the contract and conditions as made until the lawmaking power of the organization enacts legislation which by its terms applies to his contract. Consequently even where a benefit society has reserved the power to amend its by-laws, so as to affect pre-existing members, a by-law subsequently enacted will not be construed as intended to apply to such previous contract unless its intention that it should have a retrospective operation is clearly manifested; or as is sometimes said the intention that an amendment should operate retrospectively never exists by mere implication, and to give it such effect the language used must be clear and not doubtful."

The general rule as above set out was approved in *Pittinger v. Pittinger*, 28 Colo. 308, 64 Pac. 195, 89 Am. St. 193, where one of the questions determined was whether a by-law of a mutual life and accident association permitting a change of beneficiary, without consent of the latter, could be enforced under a certificate issued prior to the passage of the by-law. In construing the by-law in question this court, at page 315, said:

"Further than this, laws will not be construed as retrospective in their operation unless it is clear that they were intended to be so. This rule for the interpretation of statutes has frequently been applied in construing the by-laws of associations of a character similar to the one issuing the policies in this case. *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. 603; *Benton v.*

Brotherhood of R. R. B., 146 Ill. 570, 34 N. E. 939; *Roxbury Lodge v. Hocking*, 60 N. J. L. 439, 38 Atl. 693, 64 Am. St. 596.

"There is nothing in the by-laws in question which would indicate that it was the intention of the association that it should affect policies theretofore issued. The judgment of the district court is affirmed."

The same question was discussed in *Head Camp Woodmen of the World v. Irish*, 23 Colo. App. 85, 127 Pac. 918, where the benefit certificate provided that it was "subject to all conditions named in this certificate, and named in its fundamental laws, and liable to forfeiture if said member shall not comply with said conditions, laws, and such by-laws and rules as are or may be adopted by the head camp, or the local camp of which he is a member." The court held:

"In a case like this, where the certificate sued upon contains such a clause, the insured is bound by any reasonable by-law thereafter legally adopted. *Head Camp Woodmen of the World v. Woods*, 34 Colo. 1, 81 Pac. 261, subject to the settled rule of construction, that it will not be given a retroactive force unless such intention is clearly disclosed by the terms thereof. The question, therefore, to be considered is, was the by-law intended to have such retroactive force as would require the assured to accept either one of the options provided. * * *

"On this proposition Mr. Niblack, in his work on Benefit Societies, etc., in section 27, pages 64 and 65, states the rule as follows: "Members may contract with reference to laws of future enactment—may agree to be bound by any future by-laws or amendments which may be passed by the society, as if they were existing at the date of the contract. They may consent that new by-laws or amendments shall enter into and form parts of their contract, modifying or varying them. But the fact that a member has consented to be bound by future laws or amendments does not alter the rule that they will be given a prospective opera-

tion in the absence of a clear intent that they shall act retrospectively.

"Retroactive by-laws are regarded as impolitic and unwise, and they may often be said to be unjust, and oppressive. Although they may in a given case be valid, they will always be subjected to such construction as will circumscribe their operation within the narrowest possible limits, consistent with the manifest intention of the society as indicated by the language used."

Continuing, the court quotes from section 187, Bacon on Benefit Societies, as follows:

"It is a settled rule of construction that laws will not be interpreted to be retrospective unless by the terms it is clearly intended to be so. They are construed as operating only on cases or facts which come into existence after the laws were passed. * * * In fact, so great is the disfavor in which such laws are held, and so generally are they condemned by the courts, that they will not construe any law, no matter how positive in its terms, as intended to interfere with existing contracts or vested rights, unless the intention that it should so operate is expressly declared or is necessarily implied."

In view of the foregoing, the amendment relied upon cannot be held to be retrospective, since it does not specifically cover or extend to contracts made prior to its adoption. This is the only matter which need be considered.

Counsel for defendant cites cases bearing upon the right to pass retrospective by-laws in certain cases, and other citations refer to the question of whether rights had or had not been vested. Since the only question here is whether by its express terms, or by imperative implication, the by-law is retrospective, these decisions are not applicable. They settle law questions which we neither consider nor determine in this case. The only decision cited which holds a different view from the one which we adopt is *Gilmore v. Knights of Columbus*, 77 Conn. 58, 58 Atl. 223, 107 Am. St. 217, 1 Ann. Cas. 715, but we are not bound thereby, and we

are unwilling to follow it, especially as it appears from our own decisions that there is nothing in the by-law in question to indicate any intention to have it apply to existing contracts. This is true without having recourse to the familiar rules that, in order to give effect to contracts of insurance, they are to be liberally construed, and that by-laws of a fraternal insurance company will not, unless imperatively necessary, be given a retroactive effect.

The judgment of the trial court is reversed and the cause remanded, with directions to enter judgment for plaintiffs, according to the terms of the certificate, together with continuing interest on the amount found due from the date of the demand for payment thereof, at the rate of eight per cent per annum.

Judgment reversed and cause remanded, with directions. Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9194.

WILLIAMSON v. FLEMING, ET AL.

FENCE LAW—*Trespassing Livestock—Liability of Owner.* Under Rev. Stat. sec. 2589 the owner of livestock turning the same at large upon the public highway, is not liable for their invasion of the private lands of another who fails to maintain a lawful fence, nor for their trespasses therein, even though he expects that such trespasses shall be committed.

Error to Weld District Court, Hon. Neil F. Graham, Judge. En banc.

Mr. WILLIAM R. KELLY, for plaintiff in error.

Mr. H. E. CHURCHILL, for defendants in error.

Opinion by Mr. Justice Teller.

The plaintiff in error filed her complaint in an action for damages, and defendants in error demurred to it. The demurrer being sustained, plaintiff in error elected to stand on her complaint, and brings the case here on error.

It is alleged in the complaint that plaintiff had a growing crop on a piece of land about one mile from defendants' home, which land was unfenced on one side; that defendants turned their cattle out of their gates into the public highway, for the purpose of grazing and feeding upon lands other than their own; that said cattle went upon plaintiff's land, as defendants well knew they would do, and ate, trampled down, and destroyed said crop; that plaintiff notified defendants of said trespass, and requested them to herd their stock; that defendants refused said request, and continued to turn out their cattle, though they had full knowledge that said cattle so turned out would feed on plaintiff's crop; that defendants intended that said cattle should go on plaintiff's land; and that she had been damaged, etc.

The ground of demurrer was that the complaint did not state a cause of action.

Plaintiff in error relies upon the case of *Light v. United States*, 220 U. S. 523, 55 L. Ed. 573, 31 Sup. Ct. 485, in which it said the question of law here presented was determined. In that case the government obtained an injunction against Light's causing or permitting his stock to go upon a forest reserve, unless he had a license to pasture them thereon. The bill charged that Light turned out his cattle with the intention and expectation that they would go to said reserve, and the opinion treats the act of turning out the cattle as equivalent to a driving of them upon the reserve,—a wilful trespass.

However great may be our respect for the judgments and opinions of the court which rendered the decision in question, we are not authorized to accept as a precedent a holding which, if applied to a cause involving a question of domestic law only, would nullify a state statute; nor are we called upon, in such a case, to disregard an interpretation of said statute by decisions by this court.

The statute of this state at the time of the happening of the things alleged reads:

"Any person making and maintaining in good repair around his or her enclosure, any fence as described in section 1 of this act, may recover in a suit for trespass before any court having competent jurisdiction, from the owner of any animal or animals which break through any such fence, in full for all damages sustained on account of such trespass, together with the costs of the suit; and the animal or animals so trespassing may be taken and held for security for payment of such damages and costs; and no person or persons shall be allowed to recover damages for any injury to any crops or grass or garden products or other vegetable products unless the same at the time of the said trespass and injury was enclosed by a legal and sufficient fence as before described." L. 85, page 221, Sec. 3, Sec. 2589, Revised Statutes of Colorado, 1908.

This statute was under consideration in *Richards v. Sanderson*, 39 Colo. 270, 89 Pac. 769, 121 Am. St. 167, and it was there held that turning out cattle upon one's own land was not, if they strayed upon adjacent unfenced land, tantamount to a wilful driving of the cattle on such lands belonging to another. We there said:

"One who turns his cattle out to graze, unrestrained, upon lands where he has a right to turn them, knowing that they will probably wander on the unenclosed premises of another, is under no obligation to prevent them entering upon such premises, and if they do so enter through following their natural instincts, he is not responsible for the damages occasioned thereby. *Martin v. Platte Valley Sheep Co.*," (12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093). "This proposition is clearly applicable to the case of one who does no more than turn his cattle upon the public domain to graze, even though he knows that, following their natural instincts, they may wander upon the unenclosed lands of his neighbor. The plaintiff did turn his cattle upon public domain, in the near vicinity of lands belonging to the defendants. One-half of the territory from which they were driven either belonged to the plaintiff, or was government

land. The other half belonged to the defendants. The plaintiff may have had good reason to believe that his cattle would wander upon the lands of the defendants. This would be natural for the cattle to do. The lands embracing the public domain and that of the defendants were alternate sections covering a large area. He had a right to place them on the public domain or his own land; was under no obligation to restrain them from going upon the lands of the defendants; and therefore he would not be responsible to the latter if they did. Such a case is entirely different from those cited by counsel for defendants, where it appears that the owner of stock wilfully pastured it upon lands belonging to another, either by driving or herding thereon."

Martin v. Platte Valley Sheep Co., cited in the foregoing quotation, is to the same effect, the court holding that the owner of cattle who turned them out on the public domain, or his own land, was not guilty of an actionable trespass, although he knew that to reach water they must go upon the unenclosed land of a neighbor. It is there pointed out that, if the contrary rule prevailed, it would, in effect, prevent the running of cattle at large.

For us to sanction the position taken by plaintiff in error is to create a herd law, and nullify the statute heretofore quoted.

We are satisfied that the rule announced in *Richards v. Sanderson*, *supra*, is a correct construction of the statute and of the law as it has been applied in the western states where no statutes on the subject had as yet been enacted. *Morris v. Fraker*, 5 Colo. 425.

The judgment is affirmed.

Judgment affirmed.

Mr. Justice Allen dissenting:

This is an action for damages for trespass by defendants upon uninclosed or unfenced land of plaintiff. The injury for which redress is sought is alleged to have been caused by

the defendants' cattle entering upon the plaintiff's land and pasturing upon plaintiff's corn crop. The trial court sustained defendants' demurrer to the complaint, and the plaintiff electing to stand by her complaint, the court dismissed the action. The plaintiff brings the cause here for review.

The theory of the defendants is that upon the case made by the complaint, the plaintiff is barred from the right to recover damages from defendants by the Colorado fence statute which provides, among other things, that "no person or persons shall be allowed to recover damages for any injury to any crops * * * unless the same at the time of such trespass or injury, was enclosed by a legal and sufficient fence." Session laws 1885, p. 221; sec 2589 R. S. 1908; sec 2944 Mills Ann. Sts. 1912. According to the demurrer, the complaint is alleged to be insufficient because it does not appear "by any allegations that the defendants willfully trespassed upon the uninclosed premises and property of the plaintiff, or that they, or either of them, willfully or at all drove their cattle upon the premises or property of the plaintiff."

It is true that the complaint did not *expressly* contain such allegations as the defendants in their demurrer claim were omitted. If the complaint had alleged that the defendants willfully drove their cattle upon the uninclosed land of the plaintiff, the fence statute would have no application or bearing in the instant case. *Bell v. Gonzales*, 35 Colo. 138, 83 Pac. 639, 117 Am. St. Rep. 179, 9 Ann. Cas. 1094. A willful trespasser cannot invoke the provisions of this statute. *Sweetman v. Cooper*, 20 Colo. App. 5; 76 Pac. 925; 3 C. J. 132, sec. 402; 2 Cyc. 398; 1 R. C. L. 1104, sec. 47. But a willful trespass may be committed by the owner of animals without driving them upon the land of the complaining party. It is committed if the owner turns his cattle loose upon other land, knowing that they will necessarily enter the lands of the injured party and intends that they should do so. *Lazarus v. Phelps*, 152 U. S. 81,

14 Sup. Ct. 477, 38 L. ed. 363; Vanderford v. Wagner (N. M.), 174 Pac. 426.

In the case of *Light v. United States*, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. ed. 570, the Federal Government sought and obtained an injunction against the defendant Light enjoining him from grazing his cattle upon a public forest reservation without a permit. The bill charged that the defendant, when turning his cattle loose, knew and expected that they would go upon the reservation, and took no action to prevent them from trespassing. The complaint in the instant case contains allegations of a similar import. In the *Light* case the evidence supported the allegations of the bill. The defendant sought to justify his position, in the respect above noted, on the ground that the fence statute of Colorado provided that a landowner could not recover damages for trespass by animals unless the property was inclosed with a fence of designated size and material. The Supreme Court of the United States, in affirming the decree, stated that statutes of this kind "do not give permission to the owner of cattle to use his neighbor's land as a pasture."

The court in its opinion also said:

"Fence laws do not authorize wanton and willful trespass, nor do they afford immunity to those who, in disregard of property rights, turn their cattle loose under circumstances showing that they were intended to graze upon the lands of another. This the defendant did, under circumstances equivalent to driving his cattle upon the forest reserve. * * *

"It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the reserve to graze thereon. Under the facts the court properly granted an injunction. The judgment was right on the merits, wholly regardless of the question as to whether the government had inclosed its property."

The complaint in the instant case alleges that almost daily the defendants turned their cattle loose out of their gates at their home and "upon the public highway near plaintiff's crop;" that the defendants "well knew that, by so turning said cattle at large the same would seek and get into and eat and destroy plaintiff's corn;" that against plaintiff's remonstrances the defendants turned their cattle loose, "knowing and expecting that they would go upon the crop where there was good feed, and have taken no action to prevent such trespassing, but have intended that their cattle would pasture and graze upon plaintiff's crop." These allegations distinguish this case from that of *Richards v. Sanderson*, 39 Colo. 270, 278, 89 Pac. 769, 121 Am. St. Rep. 167, relied on by defendants. That case recognizes, without disapproval, the rule announced in *Lazarus v. Phelps*, *supra*, and is not in conflict with the views herein expressed nor with the Light case. See also *Mower v. Olsen*, 49 Utah 373, 164 Pac. 482; *Vanderford v. Wagner*, *supra*. In my opinion the complaint is sufficient as against the demurrer, and the trial court should have overruled the demurrer.

No. 9223.

CHICAGO TITLE AND TRUST COMPANY v. PATTERSON.

TAXATION—Irrigation District Taxes—District Coupons. Coupons from the bonds of an irrigation district are a lawful tender for the district tax levied for the year in which such coupons mature, but which tax is collected in the year next succeeding.

Error to Weld District Court, Hon. Robert G. Strong, Judge.

Messrs. SMITH, BROCK & FERGUSON, Mr. JOHN P. AKOLT, for plaintiff in error.

Mr. WALTER E. BLISS, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

IN addition to the necessary formal matters, plaintiff in this case alleged that it was the owner in trust of certain

lands comprising a large area situated in the county of Weld, and included within and subject to the bonded indebtedness of the Denver St. Vrain Municipal Irrigation District; that the Board of County Commissioners of Weld county pursuant to the statutes, made a certain levy of taxes for the purpose of paying the interest upon the bonds of the district; that the levy was duly extended upon the assessment roll and tax lists of the defendant treasurer, and that the County Treasurer on or about January 1st, 1917, proceeded to collect such irrigation district bond fund taxes; that the plaintiff thereupon tendered to the defendant as County Treasurer and as ex-officio treasurer of the irrigation district, the amount of taxes due for general taxes, and the current expense and general fund portion of the irrigation district taxes, and at the same time tendered in 1917, to the treasurer in payment of the bond fund portion of the irrigation district taxes, levied for the purpose of paying the interest upon said district bonds, interest coupons, maturing in 1916, in which year the Board of County Commissioners had made the levy therefor, and plaintiff demanded that defendant receive the coupons as so much lawful money of the United States in payment of such taxes payable in 1917. Further, that the amount of coupons so tendered, did not exceed the amount of the district bond fund tax which plaintiff owed, and that, notwithstanding the tender and offer by plaintiff as aforesaid, defendant refused to accept the interest coupons maturing for the year 1916, for the payment of taxes payable in 1917, but contended and claimed that under the statute he was obliged to receive only those interest coupons maturing within the year 1917, in payment of the irrigation district taxes levied in the year 1916, and payable January 1st, 1917.

Further, that there were no funds in the hands of the treasurer with which to pay the interest coupons in cash, and that interest and penalties were accumulating, because of the refusal of defendant to accept the same in payment of such taxes.

Pursuant to the prayer of the petition an alternate writ of mandamus was issued, directed to defendant who thereafter filed his answer, admitting all the allegations of the complaint or petition, and stating that defendant had refused to receive as payment of the bond fund taxes, coupons due in the year 1916, for the reason that the levy made by the county commissioners in 1916, was made for the payment of interest coupons maturing and falling due in the year 1917, and that he had no authority to receive coupons in payment of taxes payable in 1917, other than coupons maturing and falling due in the year 1917.

The facts being admitted, no evidence was introduced, and the court entered judgment dismissing the case at the cost of the plaintiff.

Section 3460, Revised Statutes 1908, provide as follows:

"It will be the duty of the county treasurer of each county in which any irrigation district is located in whole or in part, to collect and receipt for taxes levied as herein provided in the same manner and at the same time, and on the same receipt as is required in the collection of taxes upon real estate for county purposes; provided, however, that such county treasurer shall receive in payment of the general fund tax, above mentioned, for the year in which said taxes were levied, warrants drawn against said general funds, the same as so much lawful money of the United States, if such warrant does not exceed the amount of the general fund tax which the person tendering the same owns (owes); provided, further, that such county treasurer shall receive in payment of the district bond fund taxes above mentioned for the year in which said taxes were levied, interest coupons or bonds of said irrigation district maturing within the year the same as so much lawful money of the United States, if such interest coupons or bonds do not exceed the amount of district bond funds tax which the person tendering the same owns (owes)."

It is admitted that the levy was made in 1916, and for the taxes for that year but payable in 1917. It is likewise agreed that the coupons tendered, matured in 1916.

The statute provides "that such County Treasurer shall receive in payment of the district taxes above mentioned for the year in which said taxes were levied." The taxes in this case were in the year 1916, and for the tax of that year. The statute provides that coupons on bonds to be so received shall be the "interest coupons or bonds of said irrigation district, maturing within the year."

No other year is mentioned in the statute except the year in which the taxes were levied, hence it would do violence to the plain language of the state, in the ordinary and accepted meaning, to say that "maturing within the year" can apply to other coupons or bonds than those maturing within the year in which the tax was levied. Neither can there be any legitimate inference that this language can refer to any other year than the one in which the tax is levied. In fact the inference if any there should be must be to the contrary.

All taxes levied for any one year become due and payable on the first day of the succeeding year. Under the statute we are considering it is provided that interest on irrigation bonds shall be payable semi-annually on the first day of June, and December of each year.

Therefore coupons maturing in 1917, which the treasurer demanded, could not have matured on the first day of the year, when the tax became due. They were not an obligation due or on which payment could be demanded at that time. Nothing can be clearer under the language of the statute, than that in tendering coupons maturing in 1916, in payment of taxes levied in and for that year, the plaintiff met its requirements.

The policy of the law may or may not be a wise one, but it is for the court to construe its language as it finds it. The statute being explicit does not admit of interpretation beyond its express letter, and must be administered as we find it, and as was said in *Clayton v. People*, 53 Colo. 124, 123 Pac. 664, "it would be an act of judicial legislation to give to it any construction other than the plain meaning which the language indicates."

If the law requires to be remedied, that is a question for the legislature.

The judgment is reversed with instruction to grant the peremptory writ of mandamus prayed in the petition.

En banc.

Mr. Justice Teller dissenting:

While concurring in the views expressed by the Chief Justice, I deem it desirable to state my further reasons for dissent:

The majority opinion is based upon the alleged fact that the statute is explicit on the matter in question; that no other construction than that announced is possible without ignoring the language of the act. This is, I think, giving to the language used in the section quoted an effect to which it is not entitled.

All taxes are, in common parlance, taxes *for the year* in which they are levied, though payable during the next year. Hence, the phrase in the statute "for the year in which said taxes were levied," is surplusage, adding nothing to the term "taxes." The section would have the same meaning if the part now under consideration read: "Provided, further, that such county treasurer shall receive, in payment of the district bond fund taxes above mentioned, interest coupons or bonds of said district maturing within the year, etc."

This leaves the statute in harmony with the other statutory provisions, and our decisions, which, as Justice Hill points out, are in conflict with the law as construed in the majority opinion.

If the statute used the words "*said year*", it might reasonably be claimed that it referred to the year of the levy; but the words, "within the year," apply as well to the year of payment as to the year of levy.

No reason has been suggested for making the taxes payable by coupons maturing within the year of the levy, while there are reasons, readily appearing, why they should be paid by coupons of the year when the taxes are payable.

The coupons mature June first, and December first, in each year. If they can be used only for the payment of taxes *levied* that year, the coupons falling due June first cannot be used until January first of the following year, when they will be seven months past due. In the meantime, the coupons will be drawing interest. What possible reason can there be for such an arrangement for payments? On the other hand, if "within the year" means the year *in* which, and not, *for* which, payments are to be made, the June due coupons may be used as soon as they mature, and the December coupons need be not more than a month past due when used.

In providing for the use of interest coupons in the payment of taxes, the natural plan would be to make them available for the authorized use at maturity, or as soon as possible thereafter. Unless, then, the language of the statute admits of no other construction, it should not be held to intend a different plan for which there is no ascertainable reason.

There being no necessity for the construction given to the statute by the majority opinion, and the result being a requirement without foundation in reason, such construction is not justified.

Chief Justice Hill dissenting:

I cannot concur in the conclusion reached. It is in conflict with the entire plan of our irrigation district act. It is an elementary rule of construction that an act should be considered as a whole, and in thus considering it we should take into consideration all pre-existing laws and such other matters as courts take judicial notice of. In *County Commissioners v. Lunney*, 46 Colo. 403, at page 415, 104 Pac. 945, 949, it is said:

"In the interpretation of a statute the legislative purpose and object are always to be borne in mind, and an indispensable requisite is to first inquire what object was sought to be accomplished by it. The intent of the statute is the law, and general words may be restrained to it and those

of a narrower import may be expanded to embrace it to effectuate that intent."

Counsel for plaintiff in error concede that the word "owns" in the section under consideration should be read "owes" for the reason, as they state, that it is obvious that the legislature meant "owes" and not "owns," but they are not willing for the same reason that the same rule should apply to this act as a whole, for when thus considered it is not only obvious that it was not intended as they construe it, but to give it their construction is to bring the words relied upon in direct conflict with other provisions of the act. In my opinion the words "provided further that such County Treasurer shall receive in payment of the district bond fund taxes above mentioned for the year in which said taxes were levied, interest coupons on bonds of said irrigation district maturing within the year" was not intended to mean interest coupons maturing within the year that the taxes were levied but to the contrary, that the words "within the year," as there used, mean coupons maturing within the year that the taxes were payable. In other words, that the words "within the year," as there used, do not relate back to the year when the taxes were levied, but relate to the year in which they are to be paid. This construction harmonizes the entire act. The taxes were levied in December, 1916, to pay coupons due in 1917. Section 3459 Revised Statutes 1908, so provides, and the resolution of the County Commissioners making it so states, and in my opinion this was what was intended by the legislature as disclosed by this and other provisions of the act when considered in connection with it.

Section 3456, Revised Statutes, 1908, provides that the bonds and interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district. Section 3457 as enacted in 1905 provides it shall be the duty of the board of directors on or before September the 1st of each year to determine the amount of money required to meet the maintenance, operating and

current expenses for the ensuing year, and to certify to the County Commissioners of the county in which the office of said district is located, said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred. It should be observed that this section does not apply to interest coupons. By amendment in 1913, the date was changed from September the 1st to October the 15th. By a later amendment in 1915, the section provides that the fiscal year of each irrigation district shall commence on the 1st day of January in each year, and that it shall be the duty of the board of directors on or before the 15th of October in each year to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing fiscal year, and to certify, by resolution, to the county commissioners as heretofore stated.

Section 3459, Revised Statutes, 1908, remains unchanged. It covers interest coupons, and provides that it shall be the duty of the County Commissioners of the county in which is located the office of any irrigation district, upon the receipt of the certificate of the board of directors certifying the total amount of money required to be raised, as therein provided, to fix the rate of levy necessary to provide said amount of money, *and to fix the rate necessary to provide the amount of money required to pay the interest and principal of the bonds of said district as the same shall become due, etc.*

Section 3454 provides that the interest on bonds shall be paid semi-annually on the 1st day of June and December of each year. Section 3459 provides that all taxes levied under this act are special taxes. While section 3461 provides that the revenue laws of the state for the assessment, levying and collecting of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of said irrigation district act.

Under the general revenue laws of the state, the County Commissioners are required to make their levies during

the last quarter of each fiscal year, to meet the anticipated expenditures for the ensuing year. These taxes become due and payable in the fiscal year following. When these sections are considered as a whole, it follows that the levy for paying interest coupons, made in the Fall of 1916 was made for the purpose of paying the coupons falling due in June and December, 1917, and not for the purpose of paying the coupons falling due in 1916. Such is the reasoning in *Eberhart v. Cannon, County Treasurer*, 61 Colo. 340, 157 Pac. 189, wherein it is held that our irrigation district act contemplates that their management be by distinct fiscal years, and that the annual revenue of a district must be applied to discharge its expenses during the year in which the revenue was to be paid; that the provisions of section 18 of the act of 1905 requiring the district board to determine the amount of money required for each ensuing year indicated the legislative intent that districts be managed under the fiscal year system the same as counties.

The amendment to section 3457 in 1915, which was enacted prior to this decision is, in substance, the same as this court held the original act meant. It was evidently enacted to relieve any question concerning it. While this case applies to warrants only, the same reasoning was announced in *Thomas v. Patterson*, 62 Colo. 547, 159 Pac. 34, where interest coupons were involved. It is to the effect that where a levy is made one year to pay the interest coupons coming due during the year following, and during which year the taxes thereunder are due and payable, that the moneys thus raised must be used for this purpose, and none other. To the same effect is the reasoning in *Henryln Irrigation District v. Thomas*, — Colo. —, 173 Pac. 540. To hold that moneys due under the 1916 levy made to pay the 1917 coupons can be paid in 1916 coupons is in conflict with the other portions of the act as heretofore construed, for the reason that it takes the moneys levied to pay coupons due in 1917, and allows it to be used in the payment of coupons due in 1916. On the other hand, if we construe

the words "within the year" as applying to the year the coupons are due, we have no conflict in the entire act pertaining to the matter. In such case, the coupons due in 1916 can be used in payment of the taxes payable during the year 1916. These taxes were levied for that purpose, and none other. This has been the custom followed by the County Treasurers and in my opinion is what was intended.

Another reason which leads me to believe that such was intended is the order of the dates concerning these matters. While technically speaking all taxes are due and payable on January 1st, yet none are delinquent until March 1st, when, if the first half is not paid it draws interest at twelve per cent per annum until August 1st, when if the other half is not then paid it all commences to bear a penalty from that date at the rate of fifteen per cent per annum, and thus continues until the land is sold for their non-payment, which cannot occur until October, November or December following. Irrigation interest coupons are due semi-annually in June and December. Section 3459 Revised Statutes, 1908, provides that the county commissioners (upon the receipt of the certificates from the district board which would have to be on or after October 15th) shall fix the rate necessary to pay the interest on the bonds as the same *shall become due*. The record discloses that this levy was made in December, 1916, in compliance with this section and the resolution states that it was made for the payment of coupons maturing in 1917. It will thus be seen, per the arrangement of the revenue act for the payment of taxes in connection with the section last named that the moneys for their payment is arranged to come in so that it will be in the hands of the treasurer at or but a short time before they become due, and that any one owing it holding interest coupons due in the year in which it becomes due can use them in paying it without doing violence to the rights of any other. By this method, the County Treasurer will have the moneys on hand the shortest length of time, yet a sufficient time is provided for its accumulation to be reasonably as-

sured of the amount needed when the coupons become due. On the other hand, the coupons could not be used for this purpose during the year in which they become due, but in order to use them the owner would have to hold them until the next year before they could be used for this purpose. I find no provision in the act for the payment of interest on the coupons after maturity, hence to thus use them one would have to go without interest on those due June 1st until January following, and use them then in payment of the tax, the half of which he need not pay until March 1st, following, and the other half until August 1st, thereafter, without being burdened with any penalties. In my opinion, such a state of affairs was never intended.

The fact that under the current year system a person could use coupons in payment of the interest tax levy before the coupons were due, is, in my opinion, no argument against the showing that such was intended, but to the contrary the fact that the section says "interest coupons on bonds of said irrigation district maturing within the year" is, to my mind, conclusive of the fact that the ensuing fiscal year was intended, that is the year when the taxes were payable. The taxes levied in 1916 are not extended until 1917. The 1916 coupons are then all past due. If it was intended to apply to them, there was no necessity for saying "maturing within the year," but if it was intended to apply to the 1917 coupons and those maturing June 1st and December 1st are to be placed upon the same basis, and allowed to be used in the payment of one's interest tax payable during the year in different amounts and at different times without penalties, as the law provides, it was necessary to make the act read as it does when it uses the words "within the year" and in my opinion this is just what was intended by the language used.

No. 9246.

AMERICAN CENTRAL INSURANCE COMPANY v. EHRlich.

INSTRUCTIONS—*Assuming Matter in Issue.* An instruction assuming as a fact, vital matter which is in issue, is error.

*Error to Denver District Court, Hon. John A. Perry,
Judge.*

Mr. SYLVESTER G. WILLIAMS, for plaintiff in error.

Mr. WILLIAM H. DICKSON, for defendant in error.

Mr. Justice Bailey delivered the opinion of the Court.

THIS cause is here on writ of error to review a judgment against plaintiff in error The American Central Insurance Company, for \$2,055.79, claimed to be due under a mortgage clause attached to a policy of fire insurance issued by that company. One A. M. Russell is beneficiary under the policy, and the mortgage clause provides that "Loss or damage, if any, under this policy shall be payable to creditors, S. Ehrlich, mortgagee (or Trustee) as interest may appear." The right is reserved by the company to cancel the policy at any time, as provided by its terms; and provides also that in the event of such cancellation the policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to such persons. The word "creditors" was typewritten in a blank space left for the purpose, and the name "S. Ehrlich" following it was written in with a pen.

The goods covered by the insurance were in a building about to be opened by Russell as a general store, in Dalhart, Texas. Ehrlich is a resident and citizen of Denver, Colorado. The policy was issued by local agents of the company at Dalhart on February 25, 1916. Four days later it was cancelled by the general agents of the company, and the premium, less thirty-seven cents to cover insurance for four days, was returned to Russell. At the time of the re-

turn of the premium Russell signed the following relinquishment:

"February 29, 1916.

I, A. M. Russell, do hereby relinquish my right and title to any interest or claim on a fire insurance policy issued by The American Central Insurance Company of St. Louis, Mo. Said policy stands cancelled. Same being Policy No. 4002. Issued by the Dalhart agency.

A. M. Russell, Insured."

Somewhat to the left of the signature of Russell appears the name "S Ehrlich," and below it, opposite the word "Witnesseth," is the name, "J. D. Meler," one of the local agents of the company. It appears that the policy was not surrendered at the time for the reason that it had been delivered to Ehrlich, and sent by him to Denver.

Eight days after this cancellation the goods covered by the policy were destroyed by fire. Ehrlich claimed compensation under the mortgage clause upon the theory that, under it, he had an insurable interest which would be protected for ten days after cancellation of the policy. The company denied liability, whereupon suit was brought and Ehrlich secured judgment as above stated. In this opinion the parties will be designated as they were in the trial court.

A number of errors have been assigned by defendant; but in disposing of this case it will be necessary to consider only those relating to the giving of instruction No. 6, over objection of defendant, concerning the relinquishment or cancellation of the policy, as set out *supra*. It is urged, and there is testimony to support the claim, that Ehrlich affixed his signature to the relinquishment, as an acknowledgment of, and consent to, the cancellation of whatever rights he might have under the mortgage clause. This is disputed by Ehrlich, who testified that he signed it only as a witness to the signature of Russell, the beneficiary. This therefore was a question, and an important question,

of fact for determination by the jury under proper instructions. The instruction covering this point was as follows:

"The policy of insurance in this case could not be cancelled in so far as the interests of the plaintiff are concerned, except by the actual consent of the plaintiff to such cancellation. In order to establish such actual consent, it was not necessary that the policy should actually be surrendered, or should actually be marked "cancelled," and it will suffice to establish such actual cancellation if it appears that when the release was signed by Russell, and witnessed by Ehrlich and Meler, it was understood and agreed by and between the company, represented by its agents, and also by the plaintiff, that the plaintiff actually consented that such release should operate not only as a release of the interests of Russell in the policy, but also of his, the plaintiff's interests, in that policy as well."

This instruction takes from the jury the question of the capacity in which plaintiff affixed his signature to the release, as it states affirmatively that he signed it as a witness to the signature of Russell. This was one of the vital facts which the jury should have been left to determine for itself. The rule as to instructions covering controverted facts is stated in 15 R. C. L. 738, as follows:

"It is a general rule that an instruction which assumes as true the existence or nonexistence of any material fact in issue in respect to which there is some evidence or want of evidence, in conflict therewith, should not be given either by the court of its own motion, or at the request of either party, for the jury is the only tribunal passing on controverted facts in courts of law; and until the verdict is rendered no such fact is established or shown to exist. Of the right of the trial court to speak of facts as established in charging a jury it has been said that it must stop where in any reasonable view of the evidence there is room for debate as to where the truth lies."

In the case at bar the question of the significance and purpose of the signature of plaintiff to the release was

plainly debatable, there being strongly conflicting testimony on this point, and the giving of the instruction complained of was manifestly wrong and prejudicial. The judgment will therefore be reversed and the cause remanded for further proceedings according to law.

Judgment reversed and cause remanded with directions.
Mr. Chief Justice Hill and Mr. Justice Allen concur.

No. 9261.

ARKANSAS VALLEY RAILWAY, LIGHT AND POWER COMPANY
v. BALLINGER.

1. WORKMEN'S COMPENSATION LAW—*Claim Under*. Merely addressing a letter to the Commission, stating the death of the writer's husband, and that she will apply for compensation, is not a claim under the statute, and has not the effect to deprive the writer of her action against the culpable employer.
2. — *Pleading*. An employer charged with the death of an employee, attributed to his negligence, must if he would assert that the plaintiff presented a claim to the commission, and so lost her action, plead that the deceased employee or the employer himself, was, at the time of the accident, subject to the operation of the Workmen's Compensation Act.
3. MASTER AND SERVANT—*Duty to Servant of Master Employing Electricity*. One who sends to a place where the electric current is received and distributed a servant who has no special knowledge of electricity or electrical appliances, is bound to the highest degree of care, caution, and foresight consistent with the practical conduct of his operations, to avoid injury to such employee. The doctrine of the *Denver Company v. Simpson*, 21 Colo. 371, and the cases which follow it, is not to be so construed as to limit the duty in such cases to the public, at places away from the power station.

The evidence examined and held to convict the employer of negligence.

*Error to Teller District Court, Hon. John W. Sheafor,
Judge.*

Mr. WILLIAM J. MILES, for plaintiff in error.

Mr. FRANK J. HANGS, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS is an action by defendant in error, plaintiff below, to recover damages on account of the death of her husband, alleged to have been caused by the negligence of the defendant Power Company.

The defendant company was engaged in supplying electric power and machinery to its patrons in the Cripple Creek Mining District. In this case it had employed The Colorado Trading and Transfer Company, then engaged in the business, among other things, of moving machinery and materials in and about the district, to move two electric transformers, then located at its Los Angeles distributing station to another point.

One Yates was in charge of the Trading Company's work of handling and moving heavy machinery, and, working with and under the direction of Yates, the plaintiff's husband was employed. These men proceeded with teams to the distributing station for the purpose of moving the transformers. At the time Mr. Nevatt, who had charge of the station for the defendant was absent. He lived, however, with his family, in a part of the building. Yates asked Mrs. Nevatt which of the transformers were to be moved. She thereupon called her husband over the telephone, who advised her, and which information she conveyed to Yates. Yates and Ballinger then proceeded to place the transformer on a truck, operated on a track, and for that purpose, and moved the truck with the transformer toward the door. The men then discovered that the transformer would not go under the door, this being a door that was raised and lowered by means of a cable and pulley. Yates then asked Mrs. Nevatt to advise her husband of this fact, and for instructions in the premises. Nevatt then instructed that the door be removed, and testifies that he ordered it removed and placed south of the doorway.

In the meantime an employee of defendant, relative of Mrs. Nevatt, and apparently employed about the premises, advised Yates of the location of a lightning arrester, and that it was made to carry the main current of electricity,

and asked them to be careful to guard against contact with it. This man afterward and before the accident turned on the current in the arrester, which seemed to make so much noise, and cause so many sparks as to frighten Ballinger, who was unused to electrical machinery. Yates and Ballinger proceeded to move the door toward the north, but after moving it some distance, were unable to proceed for the reason that the cable which had been spliced at the point would not go through the pulley. Yates then found that it would be necessary to remove the clevice from the pulley in order for the cable to pass over it. He discovered that there were two electric wires running above the pulley and asked of the watchman as to whether or not they were charged, and advised him that they were not, but were "dead" wires.

He then secured a ladder and instructed Ballinger to go upon it and release the clevice. This Ballinger did, and with a monkey wrench undertook to turn the nut on the bolt holding the clevice. In doing this the wrench slipped from the nut, striking one of the two wires, which was in fact charged with electricity, Ballinger thereby receiving the current, from the effect of which he lost control of his muscles, and sank or fell on the arrester, where he received the shock that finally caused his death.

It appears that the wire which was so struck by the wrench was bare, or not insulated, for a space of about two inches at that point. The door was covered on both sides with sheet iron, and the testimony is that if Ballinger had one hand on the door, this would create a short circuit, causing the current to pass through his body.

Verdict and judgment was rendered for the plaintiff.

The plaintiff in error contends that the court erred in refusing to permit it to introduce testimony in support of its defense, alleging that the plaintiff had filed her claim for compensation with the Industrial Commission under the Workmen's Compensation Law, and that thereby, and by operation of law, she had assigned whatever right or cause

of action she may have had against the defendant on account of the death of her husband, and is not now the owner of said claim.

The court permitted such testimony in the absence of the jury but excluded the same from the jury.

The defendant did not plead that either Ballinger or his employer The Colorado Trading and Transfer Company, were at the time subject to the provisions of the Workmen's Compensation Law, which is a necessary prerequisite to recovery under that law, and for such reason alone the testimony was properly excluded.

But the testimony offered shows that the plaintiff did not make any such application. What she did was to write the Commission a letter stating the fact of the accident and death of her husband, and that she would apply for compensation. The commission replied to this letter enclosing an application blank but nothing further was done. This cannot constitute an election under the law, even though the parties had been subject to its provisions, which does not appear either from the pleadings or proof offered.

It is further contended that the court erred in giving the jury instruction No. 10, over the objection of defendant, as follows:

"You are instructed that the defendant was bound to exercise the highest skill, most consummate care and caution, and the utmost diligence and foresight in the maintenance and timely inspection of its electrical plant which was attainable consistent with the practical conduct of its business, according to the best known methods of the said business at and prior to the time of the accident in question, to protect all persons from injury."

It is urged that the defendant in this case may be charged with the exercise of ordinary care only.

The substance of this instruction has been approved by this court in *Denver Electric Co. v. Simpson*, 21 Colo. 371; 41 Pac. 499, 31 L. R. A. 566; *Denver Con. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39, and *Colo. Springs Elec. Co.*

v. Soper, 38 Colo. 126, 88 Pac. 161, and may be regarded as the well settled law in this state in such cases.

The defendant undertakes to distinguish the facts of these cases from those of the case at bar, and presents the argument that the care imposed by those cases had reference only to the duty of the company in relation to the safety of the public, outside, and away from, its power station, while in this case the accident occurred within the four walls of its power room, and toward those who with full knowledge of the character of the place, enter therein for their own purposes.

As to the latter statement, there is no testimony in the record to indicate that either Yates or Ballinger had special knowledge of electricity or electrical appliances, while there is positive testimony that Ballinger did not. The place was one where defendant received and distributed electric current; where it stored and kept transformers; where there must always be great danger, and where its duty to avoid danger was at least high, if not greater, in degree, than could be expected at possibly any other point within its operations. To this place it directed the employer of the deceased to perform a service for it. It was its clear duty to exercise the highest degree of care, and to use its utmost degree of caution and foresight, consistent with the practical conduct of its operations there to be transacted, to avoid such an accident as occurred.

This duty applies to any one lawfully engaged upon the premises. The rule is stated in 9 R. C. L., p. 1206, to be:

"This duty of using the necessary skill and prudence to prevent the injury to persons coming in contact with their wires is imposed upon electric companies, not only as regards the public generally, but also with respect to any individual engaged in a lawful occupation in a place where he is entitled to be. Such persons are not trespassers or licensees bound to take the premises in the condition in which they find them."

It is further urged in substance that the shock received from the wire above the door was not the proximate cause of the death of Ballinger, but that it occurred by reason of his own negligence in moving the door in the direction of, and hence being near the arrestor, so as to fall upon it, when, if they had moved the door in the opposite direction he would not have been near the arrestor, and could not have fallen upon it. The fact is that but for the wire being defective, and charged with electricity, contrary to the representation made to the deceased by the watchman in charge, there is no indication that the accident would have occurred at all. There was sufficient proof in this respect to justify the jury in finding that this defective wire so charged was the proximate cause of the accident.

In *Birsh v. Citizen's Electric Co.*, 36 Mont. 574, 93 Pac. 940; a hod carrier working on a scaffold near a wall being constructed, slipped and involuntarily threw out his hand which came in contact with one of defendant's wires heavily charged with electricity, which as in the case at bar, caused him to fall, and to be severely injured by the fall. The court said:

"So far as the injuries received by plaintiff from coming in contact with the wire directly are concerned, we think it is a fair inference from the evidence that the negligence of the defendant was the proximate cause thereof. At least we are satisfied that it was a matter properly submitted to the jury for its determination. This is the holding of the Supreme Court of Massachusetts in *Griffin v. United Electric Light Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675, 32 L. R. A. 400, a case somewhat similar in its facts. Certainly, it cannot be said that plaintiff's accidental slipping was *per se* negligence on his part. In this state the law presumes that the plaintiff exercised ordinary care."

In this case it must be assumed that the wire causing the injury was insulated as a necessary precaution against injury, and if the defendant permitted a part of this wire to become and remain without insulation, it failed to exercise

the caution which itself regarded as necessary, for if it did not know of the defect, it could by the exercise of proper diligence have known of the defective condition.

Beside, the workman before attempting to remove the clevice made particular inquiry of the employee then present, as to whether or not the wire was charged with electricity, and was expressly told that it was not.

It is contended that this workman was not authorized to make such a statement for the reason that he was not in fact in charge of the premises by authority. He was an employee of defendant; assumed to speak for it; and in the presence of the deceased, and his foreman Yates was exercising control and authority, by turning on the heavy voltage through the arrester. It was for the jury to say whether in view of all the facts and circumstances, the deceased and his foreman, were justified in believing this workman was speaking and acting with knowledge and authority to do so.

We think the question of negligence on the part of defendant, and that of alleged contributory negligence on the part of the deceased, was properly submitted to the jury.

The judgment is affirmed.

Hill, C. J., and Garrigues, J., concur.

No. 9289.

INDUSTRIAL COMMISSION ET AL. v. MARYLAND CASUALTY COMPANY.

Judgment affirmed, on the authority of No. 9288. Opinion by Teller, J.

Error to Denver District Court, Hon. John A. Perry, Judge.

En banc.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. JOHN L. SCHWEIGART, Assistant Attorney General, Mr. STEPHEN W. RYAN, for plaintiffs in error.

Messrs. SMITH, BROCK & FERGUSON, Mr. JOHN P. AKOLT, for defendant in error.

Opinion by Mr. Justice Teller.

This case involves the same questions as those which were determined in *Industrial Commission et al. v. Maryland Casualty Co.*, No.

9288, recently decided, 176 Pac. 288. For the reasons stated in the opinion in the last mentioned case, the judgment in this case is affirmed.

Judgment affirmed.

Chief Justice Hill and Mr. Justice Scott dissent.

Decided June 3d, A. D., 1918. Rehearing denied December 2d, A. D. 1918.

No. 9119.

GREGG v. THE PEOPLE.

Error to Las Animas District Court, Hon. A. Watson McHendrie, Judge.

Mr. EARL COOLEY, Mr. GEORGE BLICKHALM, Mr. JOHN BETTS, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General, Mr. BERTRAM B. BESHOAR, Assistant, for The People.

Mr. Justice Garrigues delivered the opinion of the court.

This case is a sequence of No. 9118, decided at this term of court. In that case the court found that a bawdy house existed or was kept on certain premises; that defendant, Gregg, owned the premises, and that he permitted such a place to be kept thereon, and entered an injunctive order providing *inter alia* that the building be closed and kept closed against all purposes for one year.

Plaintiff in error, Gregg, was found guilty of contempt of court for violating this order and sentenced to thirty days in jail and to pay the costs of the contempt proceeding, and he brings the case here for review on error.

There are numerous assignments of error attacking the jurisdiction of the court and the constitutionality of the act, and alleging that defendant was deprived of his liberty and property without due process of law.

These matters were all fairly considered in the other case, and it is not necessary to go into them again.

We think the evidence was sufficient to justify the court in finding that he permitted the place to remain open after the closing order of court was in effect, and the judgment will be affirmed.

Affirmed.

Decision *en banc*.

No. 9139

Affirmed on the authority of the same case in the Court of Appeals, 27 Col. App. 487.

SIMONIAN v. HENRY.

Error to Denver District Court, Hon. H. S. Class, Judge.

Mr. T. M. MORROW, for plaintiff in error.

Mr. JOHN R. SMITH and Mr. H. B. WOODS for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

This case was before the Court of Appeals upon a former hearing, 27 Colo. App. 487. There the plaintiff below and plaintiff in error here, obtained judgment against the defendant in error in the trial court. It was determined by the Court of Appeals that under the facts appearing, the law would not permit a recovery by the plaintiff, and the cause was reversed and remanded.

The opinion therein rendered expresses the law of the case. There is no material difference in the evidence produced upon the former hearing, and that upon the present trial, and no evidence, to take the case out of the rules of law there announced. The trial court upon this hearing found for the defendant. The statement of facts by the Court of Appeals is complete and any statement here would be necessary repetition.

The judgment is affirmed.

Garrigues, J. and Bailey, J. concur.

No. 8982.

Affirmed on the authority of *Gunter et al. v. Walpole et al., supra*. Garrigues, J., dissenting.

SMITH v. THE STATE BOARD OF LAND, COMMISSIONERS ET AL.

Error to Denver District Court, Hon. George W. Allen, Judge.

Messrs. GOUDY, TWITCHELL & BURKHARDT, for plaintiff in error.

Mr. FRED FARRAR, Attorney General, Mr. WENDELL STEPHENS, Assistant Attorney General, for defendants in error.

Mr. Justice Bailey delivered the opinion of the Court.

The questions here involved are, substantially in legal effect, the same as those decided in *Gunter et al. v. Walpole et al.*, reported , and the opinion therein is decisive of and controlling in this case, and necessitates an affirmance of the judgment herein.

Judgment affirmed.

Decision *en banc*.

Mr. Justice Garrigan dissents.

Mr. Justice Allen not participating.

Decided May 6th A. D. 1918. Rehearing denied December 2nd, A. D. 1918.

No. 8504.

SAMPLES v. TROWEL LAND AND IRRIGATION COMPANY.

Error to Denver District Court, Whitford, Judge.

Reversed with instructions.

Messrs. STEPHENSON & STEPHENSON for plaintiffs in error.

Messrs. GOUDY, TWITCHELL & BURKHARDT, Mr. H. R. KAUS for defendant in error.

This case was considered with and is determined by case No. 8756, *The Trowel Land and Irrigation Company v. The Bijou Irrigation District et al.*, 176 Pac. 292, and upon the authority of that case the judgment is reversed, with instruction to dismiss the proceeding.

En banc.

Hill, C. J., and Allen, J., not participating.

January Term 1919.

No. 8502.

LOCKHARD, ET AL. v. THE PEOPLE.

1. PARTIES—*Stipulations—Effect.* The parties to a litigation are not to stipulate away the rights of others having an interest in the matter in controversy.
2. APPEAL AND ERROR—*Substitution of Parties.* The parties to a writ of error having stipulated that the writ should be discontinued, a third party interested in the controversy, was, upon its petition substituted.
3. IRRIGATION DISTRICTS—*Usurpation of the Franchise,* is a public wrong which may be corrected by *quo warranto*.
4. QUO WARRANTO—*Pleading.* The complaint may be general in terms charging acts which show an intrusion into, or an usurpation of, an office or franchise.

The defendant is then called upon to show his right. There is no reason why the allegations of the complaint should be more specific than at Common Law.

Error to the Court of Appeals.

En banc.

Mr. J. W. DOLLISON, Mr. L. E. KENWORTHY, for plaintiffs in error.

Mr. C. W. DARROW, Mr. JOHN H. VOORHEES, for George Weisbrod.

Mr. E. M. SABIN, Mr. FRANK MCLAUGHLIN, FRANK EXLINE, for The Farmers Life Insurance Co.

Opinion by Mr. Justice Teller.

THIS cause is before us on error to the Court of Appeals, which reversed a judgment of the District Court dismissing the action at the cost of the relator Weisbrod.

The relator instituted a proceeding under chapter 28,

Code of Civ. Proc., R. S. 1908, to test the right of defendants,—the plaintiffs in error,—to exercise the franchise of an irrigation district, of which they claimed to be officers. A demurrer to the complaint was sustained, and, the relator electing to stand on his complaint, a judgment of dismissal was entered.

This judgment was reversed by the Court of Appeals, and the cause was then brought here for review. While it was pending in this court, the plaintiffs in error and the relator stipulated that the judgment of the Court of Appeals might be reversed and the judgment of the District Court affirmed.

Thereupon The Farmers Life Insurance Company filed its petition in this court setting up that it was the owner of a large body of land within the said irrigation district; and that it was interested in the determination of the case, as was the public also. The petitioner prayed that it be substituted for Weisbrod, as relator, and this court by its order made such substitution.

The Court of Appeals having found that the allegation of the petition that the question presented was one concerning a public matter was true, the relator did not have an absolute right to control the action; and, it appearing that others had depended on his action as a relator to test the validity of the organization in question, he could not be allowed, after his contention had been sustained by said court, to stipulate away the rights of said other persons. The cause should, therefore, be determined by this court.

The allegations of the complaint are set forth sufficiently in the opinion of the Court of Appeals. 26 Colo. App. 439, 143 Pac. 273.

The trial court held that the action sought only to redress a private wrong, and could not, therefore, be maintained.

We agree with the Court of Appeals that, while the relief sought would redress the individual wrong of the relator, it involved also a matter of public interest. Irrigation

districts are public corporations, and the usurpation of such a corporate franchise is unquestionably a public wrong.

Plaintiffs in error point out that there are other grounds upon which the demurrer might have been sustained, and contend that the complaint was not sufficiently explicit as to the defects alleged to exist in the procedure organizing the district.

In support of this position, they cite *C. & G. Road Co. v. People*, 5 Colo. 39, and *Manning v. Haas*, *Ibid*, 37.

The latter case has no reference to pleading in *quo warranto*, and the former is not authority since it merely suggests, but declines to hold that the old forms of pleading are insufficient under the Code. This suggestion is based upon a dictum in *State v. Messmore*, 14 Wis. 120, which was ignored in a series of cases in Wisconsin, and finally disapproved in *State v. Dahl*, 65 Wis. 510, 27 N. W. 343, where the old form was held sufficient.

That the complaint may be general in its terms, alleging facts showing capacity to institute the action, and directly charging acts which show an intrusion into or the usurpation of an office or franchise, will appear from a consideration of the function of a complaint in such an action.

The rule is that the State has no burden to assume in the first instance. The complaint or information is a challenge to the defendant to show by what right he is exercising a franchise or holding office, as the case may be. When the defendant has answered, the State, by replication, puts in issue such matters as are necessary to be determined. *State v. Raisin River Ry. Co.*, 12 Mich. 389, 86 Am. Dec. 64.

In *People v. Reclamation District*, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085, objection was made that the complaint did not allege the acts which constituted usurpation. The objection was held not well taken, the court holding that the ultimate fact to be alleged was that defendants were exercising a franchise without right thereto. In *People v. Canal Co.*, 23 Ohio St. 123, the court said:

"The office of an information in the nature of *quo warranto* is not to tender an issue of fact, but simply to call upon the defendant to show its warrant or charter for exercising the privileges or franchises named."

In *Lyons & E. P. Toll Road Co. v. People*, 29 Colo. 434, 68 Pac. 275, this court said that the duty is upon defendant to disclose his title to the franchise, "and if in any particular he fails to show a complete title, judgment must go against him."

The purpose and effect of the information or complaint being thus understood, there is no reason why the allegations should be more specific and detailed than was required at common law; and thus we find the rule to be in numerous decisions in code states. *State v. Berkley*, 140 Mo. 184, 41 S. W. 732; *State v. Dahl*, 65 Wis. 510, 27 N. W. 343; *State v. Stephens*, 29 Ore. 464, 44 Pac. 898; *People v. Canal Co.*, 23 Ohio St. 123; *People v. Reclamation District*, 121 Cal. 522, 50 Pac. 1068; *People v. Knox*, 38 Hun. 236, and *People v. Clay*, 4 Utah 431, 11 Pac. 206. See also cases cited in 15 Cyc. of Forms, p. 238, note.

The complaint in this case fully met the requirements stated in these decisions, and the sustaining of the demurrer was error.

The judgment of the Court of Appeals is affirmed, and the cause remanded to the District Court for further proceedings in harmony with the views herein expressed.

No. 8808.

MOUNTAIN MOTOR FUEL COMPANY ET AL. v. RIVERS.

1. *Negligence—Not Presumed.* Plaintiff must make it appear by reasonably certain affirmative evidence, that the injury of which he complains was attributable to the negligence of his adversary.
2. *Injury by Fire.* Action for injury by fire attributed to the negligence of the defendant. The evidence examined, and held insufficient to support a verdict for plaintiff.

Error to Denver District Court, Hon. A. Watson McHendrie, Judge.

En banc.

Messrs. DOUD & FOWLER, Mr. ERNEST B. FOWLER, Mr. GEORGE P. STEELE, for plaintiffs in error.

Mr. CHARLES F. MORRIS and Mr. WILLIAM R. EATON, for defendants in error.

Opinion by Mr. Justice Teller.

THE defendant in error recovered a judgment against the plaintiffs in error in an action for damages from the burning of an automobile in a garage owned by defendant Quine, but occupied by a lessee. .

The complaint charged that the defendants had been negligent in the following particulars: That the Fuel Company drove a gasoline tank motor truck into said garage, and negligently backed it against the wall, so that the gasoline in the tank was spilled upon the floor, whence it "flowed down through the floor of the said garage in and upon the furnace, or heating apparatus, of said garage, thereby causing the fire which resulted in destroying plaintiff's automobile"; that defendant Quine was negligent in having a furnace in said garage, in violation of a municipal ordinance, which prohibits the keeping of any heating apparatus in a garage; and in having a coal hole in said floor above the furnace.

It appears from the record that the tank truck was backed against the north wall of the garage so forcibly that it rebounded toward the middle of the room ten or twelve feet; that it was so damaged that the gasoline, of which there were thirty gallons in the tank, ran out at the rear on the floor; that the floor was of concrete three to five inches thick, and sloping toward the middle of the garage; that some three feet from the north wall, and four to six feet easterly from the tank, there was a coal hole

in the floor two feet square, with a cover flush with the floor; that directly beneath this opening there was a coal bin, about ten by twelve feet, boarded up to the ceiling; that from five to six feet west of the bin was the furnace, in which there was a fire at the time of the accident; that an explosion and a fire followed, almost immediately upon the breaking of the tank; and that the motor on the truck was running when the explosion occurred.

One witness testified that the gasoline poured from the back of the truck and spread both ways; that he ran to the truck with a five-gallon funnel and attempted to catch the gasoline and divert the flow to the center of the building; that the funnel was filled in a very short time, a heavy stream flowing out; and then the explosion occurred, "it flamed all at once." Another witness testified that he was in the basement, heard the tank wagon drive in and strike something, and, as he got upstairs, it all took fire. He said: "I saw a small amount of fire back of the truck, then I caught fire." And, further, "the first fire I saw was on the floor near the coal hole. I could see under the truck. Before I got out of the building the fire spread all over; there was fire on the car."

The driver of the truck was killed.

This is substantially all the testimony concerning the beginning of the fire.

At the close of plaintiff's case, the defendants moved for a non-suit on the ground, among other things, that there was no evidence which showed or tended to show that any gasoline came in contact with the heating apparatus in the basement. The overruling of this motion is assigned as error.

One witness was asked if he knew of anything in the building that could have caused the gasoline to ignite except the stove. The answer was: "Nothing only the running motor." He further said: "I have known motors to ignite gasoline," and, further, that to fill a tank with gasoline with the motor going was dangerous.

The plaintiffs in error invoked the rule that a verdict based upon conjecture and possibilities merely can not be upheld. *Chicago, etc., R. R. Co. v. Church*, 49 Colo. 582, 114 Pac. 299. Or, as is stated in *Elkton Con. M. & M. Co. v. Sullivan*, 41 Colo. 244, 92 Pac. 679: "Mere conjecture can not be resorted to, to supply the place of either direct or inferential proof." This case also properly holds that: "In an action for negligence, the plaintiff must be confined to the acts of negligence alleged, and the results thereof, whereby injury was caused, as stated in his complaint."

In *Pueblo Power Co. v. McGinley*, 5 Colo. App. 238, 38 Pac. 425, the court said: "The burden rests on the plaintiffs to show affirmatively not only that the fire might have proceeded from the defendant's use of its property, but they must make it fairly certain by reasonable affirmative evidence that it did so originate."

In this case the evidence discloses that there were two possible causes of the fire; one for which the Mountain Motor Fuel Company alone would be responsible, i. e., the firing of the gasoline from the running motor; and the other for which defendant Quine would, defendant in error claims, be responsible, i. e., the firing of the gasoline from the furnace.

The rule is, as stated in *D. & R. G. R. R. Co. v. DeGraff*, 2 Colo. App. 42, 29 Pac. 664, and frequently cited by this court, that, in cases involving the origin of a fire, "while the jury, within certain limits, may be left to infer the fact from the circumstances proved, such proof should be sufficient to rebut the probability of the fire's having originated in any other manner."

In *City of Boulder v. Stewardson*, 26 Colo. App., at p. 293, 143 Pac. 820, the court quotes with approval from a Kansas case as follows:

"Mere theories and inferences do not authorize a verdict in a case of this kind unless they are the only conclusions which can reasonably be drawn from the facts proven."

"When the fact that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must fail also if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture, and a bare possibility that the damage was caused by the negligence of the defendant is not sufficient. * * *

The facts proved are equally consistent with the theory of the accident which would discharge the defendants as with one that would charge them; and in the absence of some evidence as to the fact a judicial trial does not substitute an unfounded guess or conjecture for the legal proof which the law requires. *Deschanes v. C. & M. R. R. Co.*, 69 N. H. 285, 46 Atl. 467. To the same effect is *L. & N. R. R. Co. v. Stayton*, 163 Ky. 760, 174 S. W. 1104.

We do not find that the plaintiff's evidence is sufficient to sustain the allegation that the gasoline ran through the floor into or upon the furnace, or that the fire was due to the gasoline's, 'or gas' developed therefrom, being ignited by the fire in the furnace.

The difficulty in sustaining the verdict is that we are called upon to infer from the fact of the running out of the gasoline, and the fact that there was a hole in the floor not far distant from the tank truck, that gasoline ran through this hole; and then further to infer from this fact that it ran at once to the furnace, and resulted in the explosion.

It is elementary that an inference is not to be drawn from a fact which is itself based upon a prior inference. *U. S. v. Ross*, 92 U. S. 283. See also *City of Boulder v. Stewardson*, *supra*.

There being no direct evidence that the act of defendant Quine in placing the furnace in the basement—if negligent

because in violation of an ordinance—was the cause of the fire, and there being no circumstances shown from which that fact may be directly inferred, the verdict as against him is without support.

The judgment is accordingly reversed.

Judgment reversed.

Decided February 4, A. D. 1918. Rehearing denied April 1, A. D. 1918.

No. 8293.

THE PEOPLE v. HENWOOD.

CRIMINAL LAW—*Discharge under Habeas Corpus Act.—Effect.* The liberation of an accused person under Rev. Stat. Sec. 2926 is not an acquittal. He may be again indicted and tried for the same offense.

Error to Denver District Court, Hon. Charles C. Butler, Judge.

En banc.

Mr. JOHN A. RUSH, District Attorney; Hon. FRED FAR-
RAR, Attorney General; Mr. FRANK C. WEST, Assistant At-
torney General, for the people.

Hon. LESLIE E. HUBBARD, Attorney General; Mr. FRANK
M. LAUGHLIN, of counsel; Mr. JOHN T. BOTTOM, for plain-
tiff in error, on rehearing.

Opinion by Mr. Justice Teller.

THIS cause raised the question whether or not a person, charged with a criminal offense, who has been set at liberty, under section 2926, R. S. 1908, because of delay in bringing him to trial, may be again indicted and tried for the same offense.

That portion of the statute which is material here reads as follows:

"If any person shall be committed for any criminal or supposed criminal matter, and not admitted to bail, and shall not be tried on or before the expiration of the second term of the court having jurisdiction of the offense, the prisoner shall be set at liberty by the court, unless the delay shall have been on the application of the prisoner."

The question is what is meant by the words "set at liberty."

This is a part of our habeas-corpus act, and some help in construing it may be found in the preceding section, a portion of which is:

"No person who has been discharged by order of a court or judge on a habeas corpus shall be again imprisoned, restrained or kept in custody for the same cause, unless he be afterwards indicted for the same offense, nor unless by the legal order or process of the court wherein he is bound by recognizance to appear."

This clearly admits the possibility that a person who has been discharged from custody under a writ of habeas corpus may be again indicted for the same offense; and we see no reason why a discharge, under this provision of the section quoted, should have a greater effect than does a discharge on other grounds.

In some of the states where there are similar statutes, the term "discharge" is used instead of "set at liberty," and that is supposed to be a word of broader meaning. Accordingly, it has been held that, after a discharge under the statute, no further charge for the same offense can be made.

The Illinois statute on this subject uses this phrase, "Set at liberty," and it has been held to mean to free from the charge, so that a second indictment for the same offense does not lie. *People v. Heider*, 225 Ill. 347, 80 N. E. 291, 11 L. R. A. (N. S.) 257.

We are not impressed with the reasoning which leads to that conclusion.

On the other hand, in New Jersey, where the statute provides for a "discharge," a broader term, it is held that the effect is only to set the accused free from the pending charge, and does not prevent a second indictment. *State v. Garthwaite*, 23 N. J. L. 143.

A like ruling is made in *State v. Fley et al.*, 2 Brevard 338 (So. Car.), 4 Am. Dec. 583.

We think these rulings express the purpose of our statute. It is not concerned with the crime, nor with the punishment therefor, except indirectly, perhaps; but is intended to prevent an unreasonable detention of an accused preliminary to his trial. The accomplishment of this purpose does not require final action on the criminal charge.

The law-makers have enacted statutes of limitation as to the less serious offenses, leaving the others unaffected by lapse of time. It is not, therefore, to be supposed that they would, by this statute, make it possible to cut off the prosecution of all offenses, by mere delay in bringing them to trial.

We may easily conceive of cases in which trial is delayed for good reasons, inability at the time to secure the needed evidence, for instance, and to make such delay effect a final discharge of the accused is unreasonable and unnecessary to accomplish the humane purpose of the law.

The public good requires that persons charged with crime be tried, and either acquitted or convicted; but no interest of the state is subserved, nor is any *right* of the accused enforced by interpreting this statute as intending that the "setting at liberty" be a final discharge.

This view appears to be in accord with the views expressed by this court in the case of *In re Garvey*, 7 Colo. 502, 4 Pac. 758, where it is said, in a case not directly involving this point: "Our statute, it will be noted, does not work such discharge of the offense, but operates merely to set the prisoner at liberty."

We are of the opinion that the demurrer to the plea should have been sustained. The judgment is therefore reversed.

Judgment reversed.

Chief Justice Hill, Mr. Justice White and Mr. Justice Scott dissent.

Decided December 2, A. D. 1918. Rehearing denied April 7, A. D. 1919.

No. 8882.

BEATRICE CREAMERY COMPANY v. SYLVESTER ET AL.

SALE OF CHATTELS—Title Retained—Secret Lien—Effect. Sale of a silo, the written contract expressly stipulating that until full payment of the purchase price the title remains in the seller, that the annexation thereof to any lands of the buyer, shall not affect the right of the seller, and conferring upon the seller the right, in case of default, to retake the thing sold, is valid between the parties. The silo remains personal property.

So even as to the prior mortgagee of lands upon which the silo was afterwards erected and affixed, where it may be removed without material injury to the land.

The mortgagee is not a third person within the meaning of Rev. Stat. Sec. 512.

Error to Rio Grande District Court, Hon. Jesse C. Wiley, Judge.

Messrs. DOUD & FOWLER, Mr. E. B. FOWLER, Mr. H. M. HOWARD, for plaintiff in error.

Mr. JESSE STEPHENSON, for defendants in error.

Opinion by Mr. Justice Allen.

THIS is an action in replevin brought by the Beatrice Creamery Company against Osborne W. Sylvester and The Wallace State Bank. A trial resulted in a judgment against the plaintiff, and it brings the cause here for review. The material facts involved in this case are as hereinafter recited.

On April 26, 1913, the defendant Sylvester executed a mortgage upon his five hundred acre farm to one Wallace. The mortgage was duly recorded, and afterwards assigned to the defendant, The Wallace State Bank.

On August 9, 1913, the defendant Sylvester purchased from the plaintiff two Washington fir stave silos. At the time of this purchase the buyer, Sylvester, signed and delivered to the plaintiff two promissory notes for the purchase price of the silos. Each of these notes contained the following provisions:

"It is hereby stipulated and agreed that the title to the silos for which this note is given shall remain in possession of said company until this note is fully paid, and they shall have power to take possession of the same at any time they may feel insecure, and sell the same and apply the proceeds toward the payment of this note, and I agree to pay the deficiency.

"It is agreed that the placing of the said silos upon, or its annexation to, any lands or buildings of the purchaser shall not affect or lessen the rights of said company as herein reserved."

The silos were delivered by the plaintiff, the Beatrice Creamery Company, to the defendant Sylvester in August, 1913, and were erected upon the farm hereinbefore mentioned. The silos were twenty-four feet in diameter and forty feet in height. They were placed upon concrete foundations which were eighteen inches thick and extended into the ground about three feet. The weight of the silos held them in place. They were also held in position by pins from five to seven inches in height which projected out of the concrete foundation, and the silos were also held to the foundation by cables which could be easily detached. The value of the farm would be the same, if the silos were removed, as it was before the silos were erected. The silos can be taken down without material injury to the land.

This action is one instituted by the plaintiff in replevin for the possession of the two silos above described. The trial court held that, under the facts in this case, the plaintiff could not prevail, and found "the issues for the defendant bank."

As between the plaintiff and the defendant Sylvester, the provisions of the promissory notes as to the right of

the plaintiff to retake possession of the silos were valid and enforceable. *Harbison v. Tufts*, 1 Colo. App. 140, 27 Pac. 1014. So far as the rights of the plaintiff and the defendant Sylvester, as between themselves, are concerned, the silos remained personal property, as a result of the agreement had between the parties and made before the chattels in question were annexed to the realty. *Hughes v. Kershaw*, 42 Colo. 210, 93 Pac. 1116, 15 L. R. A. (N. S.) 723.

The principal question in this case concerns the rights of the plaintiff, the vendor of the property in controversy, as against the defendant bank, a prior mortgagee of the real estate upon which this property was placed. The plaintiff's rights against each defendant respectively are derived from the agreements, express and implied, contained in its contract with the defendant Sylvester, the purchaser of the silos. The contract reserved a secret lien to the plaintiff, as vendor of the silos, and to preserve this lien, it was agreed in this contract that the annexation of the silos to any lands or buildings of the purchaser shall not affect or lessen the rights of the plaintiff. This was an agreement to the effect that the silos should retain their status as chattels or personal property after annexation. Such agreements may be implied from a conditional sale or from a chattel mortgage by the buyer to the seller. 19 Cyc. 1048, 1049. If the contract between the buyer and the seller of the silos in the instant case is regarded as a sale with the reservation of a secret lien to the seller, there is no sufficient reason why such lien should not be held good in favor of the plaintiff as against the defendant bank. In *Puzzle Co. v. Morse Co.*, 24 Colo. App. 74, 78, 131 Pac. 791, it is said:

"The doctrine in Colorado has become well established that a conditional sale reserving a secret lien to the vendor is void as against creditors or subsequent holders having no notice thereof, and who are injuriously affected thereby. * * *

"In other words, such conditional sales as against third

parties having no notice thereof, and who are injuriously affected thereby, must be treated as absolute sales."

The doctrine announced in the above quotation does not apply in the instant case, for the reason that the defendant bank, if regarded as a "creditor" or a "third party" within the meaning of the rule, is and was not, for the reasons hereinafter stated, "injuriously affected" by the plaintiff's lien.

Under the reasoning contained in *Andrews & Co. v. Colo. Sav. Bank*, 20 Colo. 313, 318, 36 Pac. 902, 46 Am. St. 291, the contract in question may be regarded as in effect a chattel mortgage, which is "void as to third party," because not acknowledged and recorded, as required by the chattel mortgage act (Sec. 512, R. S. 1908; Sec. 620, M. A. S. 1912). The expression "third persons," or third parties, does not apply in all its literal significance so as to embrace all persons whatsoever, without regard to their interest in the property conveyed or the possibility of their being injured by the enforcement of the lien. *Groce v. Phoenix Ins. Co.*, 94 Miss. 201, 48 So. 298, 22 L. R. A. (N. S.) 732. In *Morse v. Morrison*, 16 Colo. App. 449, 452, 66 Pac. 169, it was held that the "third persons" in whose favor a chattel mortgage may be held void, "must be persons having some right or interest in the property." In *Harbison v. Tufts*, 1 Colo. App. 140, 143, 27 Pac. 1014, it was held, in effect, that an unrecorded chattel mortgage would be void only as to "creditors and bona fide purchasers without notice." In *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889, it was held that a prior mortgagee of the real estate on which chattels are placed stands neither in the light of a creditor nor of a subsequent purchaser, so as to be entitled to defeat a chattel mortgage or a lien upon such chattels. To the same effect is the case of *Cox v. New Bern Lighting & Fuel Co.*, 151 N. C. 62, 65 S. E. 648, 134 Am. St. 966, 18 Am. & Eng. Ann. Cas. 936, holding that a delay in recording a conditional sale of chattels which are affixed to mortgaged land does not affect the rights of the conditional vendor as against the prior mort-

gagee of the real estate, because such mortgagee was not prejudiced by the failure to record. In *Binkley v. Forkner*, 117 Ind. 184, 19 N. E. 756, 3 L. R. A. 33, the court said that "a prior mortgagee (of the real estate) can not occupy the attitude of an innocent purchaser." In view of the foregoing authorities, a prior mortgagee of the real estate, situated in the position of the defendant bank in the instant case, is not a "third person" within the meaning of the chattel mortgage statute above discussed, in a case where the chattel mortgage, or an instrument which is in effect a chattel mortgage, is given upon chattels annexed to the real estate. This conclusion is not inconsistent with that arrived at in *Andrews & Co. v. Bank*, *supra*, for in that case the fixtures were annexed before the real estate mortgage, or deed of trust, was given, and the deed of trust was given upon both the real estate and the fixtures. The defendant bank is not entitled to prevail on any theory based on the provisions of the chattel mortgage act.

The question remaining to be determined, and that most important in this case, is, what is the effect of the agreement between the plaintiff and defendant Sylvester, providing that the silos remain personal property and removable, as between the plaintiff and the defendant bank, a prior mortgagee?

A number of elements may be involved in the determination of such controversies. 19 Cyc. 1050. The defendant bank obtained and held its lien as a real estate mortgagee before the silos were brought or attached to the realty. It is not claimed that the bank's mortgage contained an after-acquired property clause. It is conceded that the silos can be removed without material injury to the land. It appears that the removal of the silos would not impair the security of the defendant bank. The bank, being a mortgagee, held no legal title whatever to any part of the premises. *Pueblo & A. V. R. R. Co. v. Beshoar*, 8 Colo. 32, 5 Pac. 639. In the case just cited the court said:

"By statute in this state the equitable doctrine, in the

absence of special contract to the contrary, has been made universal; plaintiff's mortgage created a lien merely."

The foregoing was quoted with approval in *Hendricks v. Julesburg*, 55 Colo. 59, 132 Pac. 61, and in *Moncrieff v. Hare*, 38 Colo. 221, 87 Pac. 1082, 7 L. R. A. (N. S.) 1001.

As applicable to such a state of facts as that appearing in the instant case, the law is clearly stated in *Jones on Chattel Mortgages* (5th ed.), sec. 133a, as follows:

"One holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore, the title of a conditional vendor of such chattels, or of a mortgagee of them, before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor."

That the principle announced in the foregoing quotation is supported by the weight of authority is evident from a reading of the exhaustive note on the point in question in 37 L. R. A. (N. S.) 120. A recent case deciding the same point is *Murray Co. v. Chickasha Cotton Oil Co.*, (Okla., 1918) 174 Pac. 1091, where the court says:

Rule "On this question there is some conflict of authority; but the weight of authority, which seems to be founded on sound principles of justice, sustains the rule that where a mortgaged chattel is attached to mortgaged realty, and the same can be removed without material injury to the real property, the holder of the chattel mortgage does not lose his rights in the chattel, and especially this rule is true where the vendor of a chattel has an express agreement with his vendee that the same shall not be attached to the realty and become a part thereof until the vendor's mortgage lien is discharged. * * *

"To hold that the chattel mortgagee lost his lien and right in the machinery, and the same vested in the real estate mortgagee, would, it seems, be taking property from one and giving it to another by legal fiction."

In *Campbell v. Roddy*, *supra*, the court says:

"But it would be difficult to perceive any equitable

ground upon which the property of another which the mortgagor annexes to the mortgaged premises should inure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance, at the time he took his mortgage, that there would be any accession to the mortgaged property. He may have believed that there would be such accession; but he obtained no rights, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long, therefore, as he is secured the full amount of indemnity which he has taken, he has no ground for complaint. There is, therefore, no inequity towards the prior real estate mortgagee, and there is equity towards the mortgagee of the chattels, in protecting the lien of the latter to the full extent, so far as it will not diminish the security of the former.] As already remarked, the real estate mortgagee is entitled to any annexation made by his mortgagor of his own property, but he is not entitled to the property of others. The property of the mortgagor in these chattels, when he made the annexation, was an equity of redemption. So far as this interest had a value, it became subjected to the lien of the prior real estate mortgage, but the value of his interest was the value of the property subjected to the lien."

In 19 Cyc. 1051, it is said:

"If the mortgage of the realty is prior to the annexation, having parted with nothing on the faith of the fixture, the mortgagee is not a purchaser for value as regards it, and generally his rights are subject to those having interests in the fixture other than the mortgagor."

Numerous cases on this subject are collected in 19 Cyc. 1051, note 87; 37 L. R. A. (N. S.) 119-124; 11 R. C. L. 1066, notes 6-8. Neither this court nor our Court of Appeals has ever held contrary to the rule announced in the foregoing authorities. In *Fisk v. Bank*, 14 Colo. App. 21, 59 Pac. 63, the facts were not parallel to those in the instant case. The court there held that the facts of that case

could not be brought within the rule announced in *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537, and *Binkley v. Forkner*, *supra*, which supports the text above quoted from Cyc. and that from Jones on Chattel Mortgages. The court did not commit itself to the contrary doctrine.

The rule which permits the plaintiff to prevail as against the defendant bank, under the facts as disclosed by the record in the instant case, is supported both by reason and by the weight of authority. We therefore adopt it, and hold that the trial court erred in finding "the issues for the defendant bank." The judgment is reversed, and the cause remanded for further proceedings in harmony with the views hereinbefore expressed.

Reversed.

Decision *en banc*.

Garrigues, C. J., dissenting:

I can not agree with the majority opinion.

The agreement that the title to the silo should remain in the vendor after it was erected on the premises constituted a secret lien, and was void as to third parties. I think the owner of the real estate mortgage was a third party. and, as to him, the silo, when erected upon the land, became real estate, like a barn or a dwelling thereon. I can see no distinction as to whether the improvement was placed on the premises by the land owner, or by another under some secret agreement with the owner.

I am authorized to state that Mr. Justice Scott concurs in this view.

Decided January 6, A. D. 1919. Rehearing granted. Judgment reversed on rehearing March 3, A. D. 1919.

No. 9178.

BRUNTON v. STAPLETON.

1. EVIDENCE—*Examination of Parties*—Scope. Defendant being called as a witness for plaintiff, the court, over the objection of plaintiff, permitted his cross-examination upon other matters than those to which he had been interrogated in chief. Held a mere question of the order of proof, and within the discretion of the court.

2. INSTRUCTIONS—*Definition*, of words of well-known import not required.
3. NEW TRIAL—*Verdict on Conflicting Evidence*, will not be disturbed.

Error to Garfield District Court, Hon. John T. Shumate, Judge.

Mr. JAMES W. KELLEY, Mr. CHARLES W. DARROW, for plaintiff in error.

Mr. M. J. MAYES, Mr. E. C. KINGSBURY, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS is an action in replevin by the plaintiff, plaintiff below, against the defendant in error, defendant below, for the recovery of the possession of a calf, of the value of \$25.00. The case was tried to a jury and a verdict and judgment rendered in favor of the defendant. The errors assigned and relied on are: First, that the defendant was called under the statutes as a witness for the plaintiff, and that the court erred in permitting defendant's counsel to examine the witness upon matters outside of that involved in the examination by the plaintiff; second, that the court eliminated parts of certain answers to depositions which are alleged to be material and competent; third, the denial of certain instructions tendered by the defendant.

As to the first assignment, it has been many times held by this court that the matter goes simply to the order of proof and that in this the trial court has a wide discretion. Upon examination of the record, we are unable to see that there was any abuse of discretion in this case, or that the plaintiff was prejudiced thereby.

We find no prejudicial error in the elimination of parts of certain answers contained in the depositions or either of them.

We find that the court generally and fully instructed the jury upon the issues in the cause, and that there was no prejudicial error to the plaintiff in refusing the instruction tendered.

The plaintiff in error makes special contention that the court should have defined the term, "preponderance of the evidence." While this definition is sometimes given in instructions, we know of no rule of practice that requires it. The words "preponderance" and "evidence" are words of common and daily use, the common and accepted meaning of which must be assumed to be understood by the jury.

There were twelve witnesses produced in behalf of one of the parties, and eleven on the part of the other. The verdict was clearly rendered upon conflicting evidence, and we see no reason why it and the judgment should be disturbed.

Judgment affirmed.

Hill, C. J., and Garrigues, J., concur.

No. 9180.

MCPhAIL v. CITY AND COUNTY OF DENVER.

1. DEFAULT—*Vacating—Discretion.* The courts of Nisi Prius have a wide discretion in relieving against defaults.
2. PROCESS—*Service of Summons,* against a municipal corporation, upon another than the officer appointed by law to receive it, will not support a default.
3. PRACTICE—*Waiver.* Error in vacating a judgment by default is waived by filing further pleadings, and proceeding to trial upon the merits.

Error to Denver District Court, Hon. John A. Perry, Judge.

Mr. DUNCAN MCPHAIL, *pro se.*

Mr. JAMES A. MARSH, Mr. JACOB J. LIEBERMAN, for defendant in error.

Mr. Justice Scott delivered the opinion of the court.

THIS was an action by the plaintiff below, plaintiff in error, against the City and County of Denver to recover the sum of \$29.10 as damages alleged to have been sustained by the plaintiff by reason of the alleged negligence of the City for failure to provide necessary outlet drains beneath

an embankment construction against a natural water course, thereby causing the plaintiff's barn to be flooded and his property damaged in the said sum.

Judgment in the case was entered by default, and thereafter, upon application by the City, the said default judgment was vacated and set aside, apparently for the reason that service of summons was not made upon the officer designated in the charter of the said City and County.

The defendant thereafter filed its answer to the complaint, after which the plaintiff was permitted to amend his complaint, and filed his replication to the answer of the defendant.

The cause was tried to a jury, and verdict and judgment entered in favor of the defendant. The errors chiefly complained of are (a) the error of the court in vacating and setting aside the default, (b) the refusal of the court to give certain instructions tendered by the plaintiff.

It seems unnecessary to consider the alleged error in the matter of setting aside the default judgment. Courts have a wide discretion in this matter and it clearly appears that the service relied on by the plaintiff was upon an officer of the City and County, other than that required by the charter, viz: the mayor or acting mayor of the city. If the plaintiff desired to rely upon the alleged errors of the court in this respect, it was within his right to have the matter reviewed by this court, but he elected to file further pleadings in the case, and to proceed to the trial of the cause upon its merits, and thereby waived any right to have such alleged errors reviewed upon this hearing.

The natural right to a full and fair trial of every legal controversy upon its merits is so engrafted upon the public mind that there can be but little sympathy with an effort to set such trial aside and hinge the result upon a default judgment irregularly obtained, or of doubtful validity. Courts will not be astute to grasp the shadow of a technicality when the substance of right and justice is at hand.

The instructions given by the court seem to be complete and comprehensive and were without objection or exception.

We find no error in the refusal to give the instructions, or any one of them, tendered by the plaintiff.

The judgment is affirmed.

Hill, C. J., and Garrigues, J., concur.

No. 9277.

PROCHNOW v. VICTOR M. COX LOAN & INVESTMENT CO.

1. *CONTRACT—Construed.* One contemplating the purchase of real property makes a deposit with the agent offering it for sale "to be held" by such agent, during the proposed purchaser's examination, and until he is "satisfied" that the premises are as represented. *Held* to imply that the deposit is to be returned if the purchaser is not satisfied of the truth of the representations made to him.
2. *Written Contract—Cotemporary parol contract with another.* A written contract by the owner for the sale of real property has no effect upon a parol contract between his agent and the proposed purchaser.

The agent is bound by his contract to return a deposit made with him whenever the conditions entitling the purchaser to the return, under his contract, are shown.

Error to Denver District Court, Hon. John A. Perry, Judge.

Mr. GEORGE F. DUNKLEE, Mr. EDWARD V. DUNKLEE, for plaintiff in error.

Mr. BERT MARTIN, for defendant in error.

Opinion by Mr. Justice Allen.

THIS action was brought by the plaintiff in error, hereinafter referred to as the plaintiff, against The Victor M. Cox Loan & Investment Company, the defendant in error, and one Frances B. Osbon. The plaintiff sues to recover the sum of \$250 which had been deposited by him, as a prospective purchaser of certain household goods with the possession of a rooming house, with the defendant in error, who was the agent of the defendant Osbon.

Upon trial, and at the close of the evidence on both sides, the court directed a verdict in favor of the defendant in

error, the agent, upon the ground that, as stated by the trial judge:

"In this case, there is nothing in either the written pleadings of the parties nor in the evidence adduced at the trial which will warrant a verdict of any kind against the defendant, The Victor M. Cox Loan & Investment Company."

The plaintiff brings error, and submits for our determination the question whether or not the court erred in directing the jury to find the issues for the defendant Cox Company. The jury found as directed, and judgment was rendered accordingly.

As against the defendant, The Victor M. Cox Loan & Investment Company, the complaint alleges, in substance, that on account of representations made by the defendant in an advertisement, the plaintiff called at the defendant's office to investigate the offer contained in the advertisement, which, published in the public press, read as follows:

"Twelve-room beautiful Capitol Hill house, elegantly furnished; large, bright, sunny rooms; large lawn, trees; verandas and sleeping porches; lease with only \$35 monthly rent. Price for quick deal, \$775, with \$250 cash, balance monthly. The Victor M. Cox Loan & Investment Company."

That the plaintiff was then and there informed by the defendant company "that the matters and statements in said advertisement were true; that the premises were renting for \$86.00 per month, and that the said defendant company was the agent for the sale of said property, * *

* ; that relying upon the matters and statements set forth in said advertisement, and the assurances of the defendants that the same were the facts, this plaintiff, believing the same to be true, was induced by the defendant, The Victor M. Cox Loan & Investment Company (agent), to put up as a deposit on the same the sum of \$250 under the terms of a certain written contract." The complaint then sets out the written contract, which is one made between the plaintiff and the defendant Frances B. Osbon.

Next is set forth an oral contract contemporaneously made between the plaintiff and the defendant Cox Company, the agent, and it is upon this oral contract that the plaintiff's right against the defendant agent depends. The allegations in this connection are as follows:

"That at the time of the signing of said agreement by the plaintiff and said defendant company as agent, it was expressly contracted and agreed that the certain \$250.00 to be paid as a deposit was to be paid to the defendant The Victor M. Cox Loan & Investment Company to be held by it until the plaintiff had examined all of the property and had joined in taking an inventory of said property and was satisfied that the property was in every respect as had been represented to him by the said advertisement and that the statements of said defendant company, as agent, in confirmation of said advertisement."

The foregoing expressed term of the alleged oral contract made between the plaintiff and the defendant agent implies that it was agreed that the money was to be returned to the plaintiff in the event that the representations referred to were false, and in case plaintiff, upon examination of all of the property, was not satisfied that the property was in every respect as had been represented to him. 13 C. J. 558, sec. 521.

The complaint further alleged, in substance, that the plaintiff thereafter "went through said premises" and "then learned for the first time that the statements contained in said advertisement, and those made by the defendant company, concerning said property, were false; * * * that said house 'was not a twelve-room house; * * * that said rooms were not elegantly furnished; * * * and that said property was not bringing in an income of \$86.00 per month." It is further alleged that the plaintiff "was unsatisfied" and demanded the return of the \$250 deposited by him with the defendant company.

Further details of the complaint need not be herein stated, because no reason or consideration is called to our attention why we should not hold the complaint sufficient

if the plaintiff sought to plead a cause of action against the defendant agent upon its oral contract to return the deposit of \$250.00 upon certain contingencies. Counsel for defendant in error states in his brief that the trial court rules against the plaintiff "upon two propositions," the first being to the effect that the written contract mentioned in the complaint can not be varied by parol evidence. The written contract was, however, an agreement between the plaintiff and the defendant Osbon, and we see no reason why the written contract should affect the agent's liability upon its own contract.

The next point urged by the defendant in error is stated by its counsel as follows:

"That the plaintiff did not state a cause of action against the defendant company for the reason that this suit was upon the contract for the return of the money, and that under the circumstances a right of action would lie only against the principal."

This contention erroneously assumes that the suit is based upon the written contract which was entered into between the plaintiff and the defendant Osbon. As against the defendant Osbon, the principal under the written contract, the complaint appears to be for a rescission of the contract and for the return of the money paid under it. As against the defendant agent, the defendant in error, the action is for the return of the deposit under the oral agreement entered into between the plaintiff and the agent. The agent, according to the allegations of the complaint, agreed to return the money to the plaintiff upon certain contingencies, and those contingencies arose shortly thereafter. There is no reason why the agent should not be bound by its verbal contract. In 2 C. J. 823, sec. 496, it is said:

"Where the terms under which the agent has received the money impose upon him a personal liability for its return upon certain contingencies, he may be held personally liable, upon the happening of such contingencies, for its return, although he has paid it over to his principal."

We are of the opinion that the complaint stated a cause of action against the defendant agent, and that the trial court was in error in assuming otherwise when directing a verdict for the agent. The plaintiff's evidence corresponds with the allegations of the complaint sufficiently to be regarded as tending to prove his cause of action against the agent. Such testimony was sufficient to sustain a verdict for the plaintiff and against the defendant agent. This being true, as we find from the record, regardless of whatever evidence the defendant introduced in its own favor, it was error to direct a verdict in favor of the agent upon the ground that "there is nothing in either the written pleadings nor in the evidence" warranting "a verdict of any kind" against the defendant agent. The defendant agent's answer was chiefly in the form of a denial. The issues thus framed by the pleadings should have been submitted to the jury.

For the reasons above indicated, the judgment is reversed and the cause remanded.

Reversed.

Chief Justice Hill and Mr. Justice Bailey concur.

No. 9279.

PARMALEE v. THE PEOPLE.

NEW TRIAL—*Single Witness Discredited.* A conviction of crime upon the unsupported testimony of a single witness who was manifestly entirely mistaken as to a controlling fact vacated.

Error to Yuma District Court, Hon. H. P. Burke, Judge.

Messrs. ROBERTS & ROBERTS, for plaintiff in error.

Hon. LESLIE E. HUBBARD, Attorney General; Mr. BERTRAM B. BESHOR, Assistant Attorney General, for the people.

Mr. Justice Bailey delivered the opinion of the court.

PLAINTIFF in error, defendant below, was convicted upon an information charging that he wilfully, feloniously,

knowingly and designedly, by false pretenses, obtained a promissory note of the value of \$69.93, from the prosecuting witness, by falsely and fraudulently representing that it was a receipt, with the intent to cheat and defraud. He alleges error, and brings the case here for review.

The defendant was a sewing machine agent and salesman. The transaction upon which the information is based was the sale by him to the prosecuting witness of a sewing machine, for which he received in payment an old machine and a note for the balance of the purchase price. The only testimony tending to support the information is that of the prosecuting witness. Ordinarily the verdict of a jury will not be set aside by this court, but the abstract before us shows absolutely that the prosecuting witness either had forgotten, or was entirely mistaken, as to a vital and controlling fact involved in the transaction. The jury, in order to return a verdict of guilty, was of necessity obliged to rely entirely upon the testimony of this witness. The record shows conclusively that the essential facts are contrary to and in conflict with her testimony. The verdict is manifestly at variance with the proofs, and the judgment based upon it should therefore be vacated.

Upon the whole record it is apparent that there was nothing in the transaction complained of to support a conviction for obtaining the note in question by false pretenses. The judgment of the trial court is accordingly reversed and the cause remanded for further proceedings. The former opinion is withdrawn and this substituted in lieu thereof.

Judgment reversed and cause remanded.

Decision *en banc*.

Mr. Justice Burke not participating.

No. 8910.

WHITT v. ORCHARD PRODUCTS COMPANY ET AL.

PLEADING—*Fraud*. A complaint alleging fraudulent representations as to the financial condition of a corporation, inducing the purchase of stock therein, sustained.

Error to Denver District Court, Hon. A. Watson McHendrie, Judge.

Department Two.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. GEORGE O. MARRS, for plaintiff in error.

Mr. FRED W. PARKS, for defendant in error.

Opinion by Mr. Justice Denison.

THIS was an action for false representations inducing plaintiff to purchase stock in the defendant company.

The agreed record on error shows that a general demurrer was sustained to the second amended complaint. An amendment was then added, which was afterwards stricken out by the court, and a demurrer to the complaint was then sustained again, on the ground that the representations stated in the complaint were not such as to be actionable, even though false. The representations were as follows:

(a) That the business of The Orchard Products Company was then a good and profitable business, which had paid in profits and dividends for the year 1912 the sum of \$2,000.00, and for the year 1913 \$2,200.00.

(b) That the total outstanding indebtedness of said The Orchard Products Company was at that time only \$2,500.00.

(c) That the said corporation from its business had always paid dividends since its incorporation.

(d) That the said corporation then had on hand in salable and marketable condition a large stock of manufactured goods reasonably worth the sum of \$5,000.00.

(e) That a large quantity of casks and other containers, which were pointed out to this plaintiff by the defendants, were filled with large quantities of pickles, chow chow, fruits, jellies and other products, all in first-class and salable condition and ready to be marketed.

(f) That the said The Orchard Products Company was in a prosperous and paying condition; that it then had a

good will and a good trade, with a sufficient supply of stock in hand and a sufficient number of orders for goods to insure prosperous and profitable dealings in the conduct of its business for several years to come.

The striking out of this amendment and the sustaining of the demurrer are assigned for error.

The complaint, without the amendment, states a cause of action.

The judgment should therefore be reversed, with directions to overrule the demurrer, and give the defendant leave to answer.

Judgment reversed, with directions according to opinion. Chief Justice Garrigues and Mr. Justice Scott concur.

No. 9097.

STANLEY-THOMPSON LIQUOR COMPANY v. SOUTHERN COLORADO MERCANTILE COMPANY.

1. *ACCORD AND SATISFACTION—Payment and Acceptance of a Less Sum than Claimed.* A set-off of uncertain amount renders the debt unliquidated although the amount thereof is not in dispute. And this, even though the counter claim grows out of a transaction other than that giving rise to the indebtedness asserted by plaintiff.
2. *Evidence.* The tender of a smaller sum than that claimed, with notice that it must be accepted in full satisfaction, or rejected, constitutes, if accepted, an accord and satisfaction. A voucher accompanied by a check bearing the indorsement "Payee's indorsement will be considered an acknowledgment in full," being accepted by the payee, and collected, held to affect notice that the amount of the check was tendered in full satisfaction.
3. *Pleading—Waiver of Defects.* No demurrer being interposed to the answer, and the cause being tried as if the issue of accord and satisfaction was presented, all objections to the answer were regarded as waived.

Error to Las Animas District Court, Hon. Granby Hillyer, Judge.

Mr. T. S. MCCHESENEY, for plaintiff in error.

Mr. JESSE G. NORTHCUTT, Mr. E. B. UPTON, for defendant in error.

Opinion by Mr. Justice Allen.

THIS is an action brought by The Southern Colorado Mercantile Company, hereinafter referred to as the plaintiff, against The Stanley-Thompson Liquor Company, defendant, to recover the sum of \$19.43 claimed to be due as an unpaid balance on a bill of \$97.28 for liquor sold by plaintiff to defendant.

The defendant pleaded, and at the trial sought to prove, the defense of accord and satisfaction. At the close of the evidence each party moved for a directed verdict in its behalf respectively. The court sustained the motion of the plaintiff, and instructed the jury to return a verdict for the plaintiff in the sum of \$19.43 and costs. The defendant brings the cause here for review.

It is contended by the defendant that the defense of accord and satisfaction was proven at the trial, and that "the court erred in holding that the check given in payment of the accounts between the parties did not constitute an accord and satisfaction." The check in question, which was introduced in evidence, is a combination voucher and check, and, together with the endorsements thereon, is in the following words and figures:

THE STANLEY-THOMPSON LIQUOR COMPANY.

Voucher No. 860.

TO The Southern Colo. Merc. Co.

Invoice No.	Date of Bill.	Amount of Bill.	Amount Paid.
1047	1915/11/17	97.28	77.85
		Deduct 19.43	
		77.85	
Less 9 Pts. Champagne from Mike Skiles @ 42.00			15.75
" 4 Qts. Cedar Brook " " "			3.68
PAID			
12	9	15	

Total amount of this voucher 77.85

CORRECT T. A. Thompson

THE STANLEY-THOMPSON LIQUOR Co. 860

Trinidad, Colorado, Dec. 3d, 1915.

When properly receipted

PAY TO THE ORDER OF The Southern Colo. Merc. Co. \$77.85
Seventy Seven 85/100 DOLLARS
(Not over Ninety Dollars \$90.)

THE STANLEY-THOMPSON LIQUOR Co.

T. A. Thompson, Treasurer.

To THE FIRST NATIONAL BANK,
Trinidad, Colorado.

(Endorsements on back of check and voucher.)

If not correct return without alteration and state difference.
Payee's endorsement will be considered acknowledgment in full.

Make all endorsements below.

Pay THE INTERNATIONAL STATE BANK, Trinidad, Colo., or
Order.

THE SOUTHERN COLORADO MERCANTILE Co.

THE INTERNATIONAL STATE BANK

Paid Dec. 9, 1915

TRINIDAD, COLO.

The general rule relied on by defendant may be stated as it is expressed in 1 Corpus Juris 551, sec. 71, as follows "Where a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed, in satisfaction, operates as an accord and satisfaction." This rule has been, a number of times, applied or referred to by this court and by our Court of Appeals. *C., R. I. & P. Ry. Co. v. Mills*, 18 Colo. App. 8, 69 Pac. 317; *Harvey v. D. & R. G. R. R. Co.*, 44 Colo. 258, 99 Pac. 31, 130 Am. St. Rep. 120; *New York Life Insurance Co. v. MacDonald*, 62 Colo. 67, 160 Pac. 193; *Colorado Tent & Awning Co. v. Denver Country Club*, — Colo. —, 176 Pac. 494.

The plaintiff contends that its claim, in payment of which the check was sent, was not a claim which was "unliquidated or in dispute," and that therefore the rule above stated is not applicable. This contention can not be upheld. The record shows that before the check in question was issued and tendered by the defendant to the plaintiff, the latter claimed the sum of \$97.28 as being due from the defendant for liquors sold and delivered. The defendant admits the correctness of this demand, and conceded the same when the check was sent, but itself made a claim against the plaintiff for \$19.43 on account of a quantity of champagne and whiskey alleged to have belonged to the defendant and to have been converted by the plaintiff to its own use. This counterclaim of the defendant was disputed. What was due to the plaintiff, therefore, could be determined only by deducting from its claim of \$97.28 whatever sum the defendant was entitled to under its counterclaim. Until the amount of the counterclaim was determined, it was uncertain what the defendant's debt to the plaintiff was. That a set-off or counterclaim which is uncertain in amount renders the debt unliquidated, though plaintiff's claim is not in dispute, is settled in this state by the decision of this court in *New York Life Insurance Co. v. MacDonald*, *supra*. Moreover, the opinion in that case is in accord with the weight of authority in the United States. 1 C. J. 556, sec. 78; 1 R. C. L. 198, sec. 33. The

rule is not affected by the fact that the counterclaim does not grow out of the same transaction which gave rise to the plaintiff's claim. The check in question, in the instant case, was only for the amount conceded by the defendant to be due, but this fact does not preclude an accord and satisfaction. In *C., R. I. & P. Ry. Co. v. Mills*, *supra*, it was said: "Nor is the settlement affected by the fact that the creditor receives only what the debtor concedes to be due."

It next remains to be considered whether the check was accepted in payment of the debt, and whether, under the evidence, this case falls within the rule stated in 1 C. J. 562, as follows:

"When a claim is disputed or unliquidated and the tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted in full satisfaction of the claim or not at all, the retention and use thereof by the creditor constitutes an accord and satisfaction."

The check and voucher in question was sent to the plaintiff by the defendant through the mails. The evidence shows that at and prior to the time that the check was thus issued and tendered, the plaintiff knew that the defendant was claiming payment for certain whiskey and champagne alleged to have been taken by the plaintiff from the saloon of one Mike Skiles. The voucher, which was attached to the check, shows that the defendant, in making payment of the plaintiff's bill, deducted what it claimed to be due to itself on account of its counterclaim, and indicated on the voucher that the amount so deducted related to the whiskey and champagne "from Mike Skiles." The plaintiff should have known from this circumstance that the check was tendered in full settlement of all that the defendant owed plaintiff. Furthermore, the endorsement on the back of the check also shows that the check was offered on the condition of being in full satisfaction of the debt. The endorsement reads as follows:

"If not correct, return without alteration and state dif-

ference. Payee's endorsement will be considered acknowledgment in full."

The words "acknowledgment in full," when taken in connection, and considered, with the existing circumstances and all other recitals in the voucher and check, indicate that they mean the same as if the expression was "Acknowledgment of payment in full of all accounts," or some other phrase of like import. The creditor must have so understood the endorsement, and is presumed to have read it before signing its name beneath it and having the check cashed. The law charges the plaintiff creditor with knowledge of all the wording and contents of the voucher and check in question. *Michigan Leather Co. v. Foyer*, 104 Ill. App. 268. The plaintiff had notice from the words contained in the voucher and check, and from the attendant circumstances, that the check was being offered in full satisfaction of its claim.

The check was received, endorsed, and cashed, and the money obtained thereon was retained by the plaintiff. Neither the check nor the proceeds therefrom was ever returned or offered to be returned by plaintiff to defendant. It must be held, therefore, that the check was accepted on the conditions on which it was offered, and that its acceptance constituted an accord and satisfaction. *Colorado Tent & Awning Co. v. Denver Country Club*, *supra*.

The plaintiff also contends that accord and satisfaction was not properly pleaded. No demurrer was interposed to the answer. The cause was tried as if accord and satisfaction was in issue. The objection to the pleading must therefore be deemed waived by the plaintiff. *Berdell v. Bissell*, 6 Colo. 162; 1 C. J. 579.

We are of the opinion that accord and satisfaction was clearly shown by the evidence, and sufficiently so to have required a directed verdict for the defendant. The judgment is therefore reversed, and the cause remanded with directions to enter judgment for defendant.

Reversed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

No. 9165.

LOVE v. COTTEN.

1. NON-SUIT—*Motion for*, admits every inference of fact that can be legitimately drawn from the plaintiff's evidence.
Plaintiff suing to quiet title to a water right produced a writing subscribed by one Lock, the original proprietor of the ditch, declaring that he had sold to parties named, the same from whom plaintiff produced title, "an undivided half interest in the ditch."
- There was no evidence that Lock owned any other ditch which could have supplied water to the premises of those named in the writing as vendees, *Held* it was to be presumed that the writing referred to the single ditch so owned by Lock.
2. WITNESS—*Competency*. A witness is not excluded under Sec. 7267 of the Revised Statutes, where he has no interest in the suit in which his testimony is offered, even though he is concerned in a different suit, involving the validity of a contract, upon which depends the suit in which he is offered.
3. POSSESSION OF WATER RIGHT—*Effect*. After the purchaser of a water right has long been in possession under an informal writing, the informality cannot be urged against his right.
4. WATER RIGHT—*Adjudication Decree*, cannot determine the title to a ditch, or the right to enjoy the waters thereof, but only the relative priorities of the different ditches in respect of priorities as claimed.

*Error to El Paso District Court, Hon. W. S. Morris, Judge.
Department One.*

Mr. W. D. LOMBARD, Mr. W. N. RUBY, for plaintiff in error.

Messrs. ORR, ROBINETT & MASON, Mr. J. C. YOUNG, for defendants in error.

Opinion by Mr. Justice Teller.

PLAINTIFF in error brought suit to quiet title to a one-fourth interest in the waters of the Lock Ditch, No. 15, in El Paso County, including priorities Nos. 15, 22 and 43.

He alleged in his complaint that in 1879 one Mathias Lock was the owner of the said Lock Ditch, which he used to carry water for the irrigation of his land; that, in April of said year, said Lock sold an undivided one-half interest

in said ditch and the water-right belonging thereto to one Owen and William A. Love, to each a one-fourth interest; that said Lock executed an instrument conveying said interest to said parties; that, later in said year, said Owen and Love, under an agreement with said Lock, enlarged said ditch, and paid said Lock \$100, the increased quantity of water carried by said ditch to be divided as before; that plaintiff had succeeded to the rights of said William A. Love; that the water in said ditch had been used by said parties in the proportion above named since said sale, until recently, without objection on the part of said Lock, his heirs or assigns; that on the adjudication of water-rights in that district, in 1882, it was agreed by said parties that said Lock should attend to the adjudication of rights in said ditch, the rights of each of said parties to be preserved by whatever decree was made; that plaintiff had recently, for the first time, become aware that the decree obtained by said Lock gave to him, alone, the right to priority No. 15, being the right to the water carried by said ditch before said enlargement, and to said Lock one-half, to Owen one-quarter and to said William A. Love one-quarter, in priorities Nos. 22 and 43, being the additional water carried after said enlargement; and that defendants, successors to the rights of said Lock, were claiming that plaintiff had no interest in said priority No. 15.

At the close of plaintiff's case the court sustained a motion for a non-suit, and dismissed the complaint.

This ruling is now assigned as error, as is also the sustaining of an objection to the deposition of said Owen.

It is difficult to understand upon what ground the motion to dismiss was sustained.

A tenant of the Lock farm, in 1880, testified that Lock at that time told him that he had sold one-half of the water in the ditch to Owen and Love; and that the farm was entitled to one-half of said water. This witness also stated that the water was used by him in that proportion.

Two other witnesses, one having resided on the Love ranch in 1879, testified to such use of the water that year,

and that it had been so used ever since said date; that is, Lock used all the water four days, Love two days and Owen two days. One of these witnesses testified that, in 1879, the water was divided in the ditch, in said proportion, the dividing apparatus having been made and installed by Lock.

Another witness testified to its use, as above stated, in 1903 and 1904, he having been a tenant of the Owen farm in 1903, and working on the Love farm in 1904.

A witness, who was water commissioner of that district two years, and a deputy commissioner afterwards, testified that the water was used in said proportion.

In addition to this, there was in evidence the following writing, plaintiff's Exhibit "B":

"Lock's Ranch, April 29, 1879.

This is to certify that I have sold to Wm. Love and Thomas Owen an undivided one-half Interest in the ditch according to contract Exclusive the Right to put a wheel on Said Ditch for watter power Said wheel shall not interfere with the Natural Grad of the Ditch or check the watter to the Injury of the said Love and Owens. I also have received Payment in full for said Interest in Said Ditch.

MATT'S LOCK."

Counsel for defendants in error contend that this writing has no probative force because it does not identify the ditch to which it refers, and that, if the evidence is equally consistent with the theory that Lock owned more than one ditch, the writing is robbed of all force. This position ignores the rule that a motion for a non-suit admits every inference of fact that can legitimately be drawn from plaintiff's evidence. In the absence of evidence of the existence in 1879 of another ditch owned by Lock, and capable of supplying water to the Owen and Love farms, the court was bound to presume that the contract referred to Ditch No. 15.

If, however, the contract was ambiguous in not describing the ditch, the defect was remedied by the testimony of Thomas Owen, by deposition, which was excluded on the

objection that he was barred by the statute, the suit being against the executors of Lock's will, and sundry devisees.

The exclusion of this testimony is assigned as error. In defense of the ruling, it is urged that Owen was within the excluded class in such suits because he had a case pending which involved the same contract sought to be established in this cause.

The statute, sec. 7267, R. S. 1908, bars parties to civil actions, suits or proceedings, or persons "directly interested in the event thereof." The witness Owen was interested in the question of the validity of the contract, but he was not interested in the event of this suit. However it might result, his action might terminate differently. Discussing statutes like ours, it is said in 40 Cyc., page 2280:

"In order to disqualify a witness, his interest must be present, direct, certain and vested; and such interest must be in the event of the particular case, and not merely in the question to be decided therein."

Smith v. Smith, 22 Colo. 480, 46 Pac. 128, 34 L. R. A. 49, 55 Am. St. 142, is clearly in point, it being there held that the consolidation of several suits, involving the same transaction, but with different parties defending as heirs, was an injury to the defendants because each defendant was thereby deprived of the testimony of the other defendants in the suit.

The exclusion of Owen's deposition was prejudicial error, since, if there were any doubt as to the making of the contract on the other testimony, it was set at rest by his positive statements as a party to it. The evidence is undisputed that the contract was fully performed, and that the buyers of the rights were put in possession thereof, and possession retained ever since the date of sale. It is now too late to question the validity of the contract on the ground of its form. *McClure v. Koen*, 25 Colo. 284, 53 Pac. 1058.

Defendants in error claim that the adjudication decree, making Lock the owner of priority No. 15, is conclusive against the plaintiff, and the trial court appears to have

been of that opinion. Such is not the fact. The decree could not determine the ownership of the ditch, or the rights to its waters, but only the relative priorities of the different ditches. *Evans v. Swan*, 38 Colo. 92.

The judgment is reversed.

Judgment reversed.

Chief Justice Hill and Mr. Justice White concur.

No. 9191.

HITCHENS v. MILNER LAND, COAL AND TOWNSITE COMPANY.

1. PLEADING—*Laches*. The defense is presented only by answer.
 2. NEGLIGENCE—*In Matters of Contract*. The execution of a conveyance of lands is not, of itself, a bar to an action for its reformation.
 3. EQUITY—*Reformation of Writings*. The party complaining is not barred of relief by the circumstance that he executed the paper without reading it.
 4. *Bona Fide Purchaser*. To constitute one a bona fide purchaser he must have parted with value, without actual or constructive notice of the right of another.
 5. NOTICE—*Possession of Lands*, open and exclusive, is notice of the interest of the one in possession.
 6. *Possession of a Ditch and its Waters*. A doctrine applies to an easement, e. g., to a water right.
- The possession and use are deemed continuous, though the water is not applied during the winter season.
- That the water never was or could be applied to the land to which it was erroneously conveyed, might be sufficient to put subsequent purchasers of the land upon notice.

*Error to Routt District Court, Hon. John T. Shumate,
Judge.*

Messrs. GOODING & GOODING, Mr. ADDISON GOODING, JR.,
for plaintiff in error.

Mr. JOSEPH K. BOZARD, for defendant in error.

Opinion by Mr. Justice Allen.

THIS is a suit for the reformation of a deed of trust, and to have the plaintiff declared to be the owner of a certain

ditch and water right which is alleged to have been erroneously included in the description of property in the trust deed. The main question presented for our consideration is the sufficiency of the complaint, when tested by the demurrer which was filed by the defendant, and sustained by the trial court. The plaintiff below elected to stand on the complaint, and brings the cause here for review upon the question above mentioned.

The suit was brought on December 28, 1915. The complaint for a first cause of action alleges, in substance, that on March 10, 1897, the plaintiff was the owner in fee simple of a certain tract of land and also "The Farnsworth Ditch and Water Right, same consisting of 2.66 cubic feet of water per second of time, adjudicated to the plaintiff;" that at that time the plaintiff, desiring to secure a loan, offered to one Harding the above mentioned land as security for a loan, "expressly and specifically excepting from such offer the said Farnsworth Ditch and Water Right," and the said Harding agreed to loan the sum of \$500 on such land; that on March 19, 1897, the plaintiff executed his certain deed of trust to the Public Trustee of Routt County, Colorado, to secure to one W. H. Seegar, for whom Harding was the agent, the repayment of the loan of \$500.00; that the trust deed was prepared by Harding; that Harding, contrary to the agreement with the plaintiff, and to the intention and understanding of the parties, falsely and fraudulently and with the intention of making a profit for himself, "inserted in said deed of trust a description of said Farnsworth Ditch and Water Right, and the plaintiff relying on the skill and capacity of said Harding, he being then and there an attorney at law, and relying upon his integrity and honesty, signed and executed said deed of trust, without reading the same, and without knowing that thereby he conveyed his interest in and to said Farnsworth Ditch and Water Right, along with said land, to said Seegar."

The complaint further alleges that the land conveyed lies high above the Farnsworth Ditch, and that it is impossible by reason thereof to apply any part of the water

to that tract of land; that ever since plaintiff executed the deed of trust, conveying the above mentioned tract of land, he

"has been in the actual and exclusive possession of said ditch and water right, and has used the same throughout the summer months of each year, and did not know of the fact of said trust deed describing said water right and ditch until on or about the 2nd day of August, 1915."

Subsequent purchasers of the property, described in the deed of trust, are then named in the complaint, and it is alleged that neither the defendant, the last purchaser, "nor its predecessors in interest or privies in estate in said lands have ever at any time used said water through said ditch or otherwise or at all, and have never at any time, although at all times aware of the fact of the plaintiff's continuous and notorious use of said water and said ditch, attempted to restrain him from so using said water and ditch, nor in any manner or method asserted or attempted to assert any right, title, or interest in or to said ditch and water right."

The prayer of the complaint, after setting up a first cause of action, is for the reformation of the deed of trust "and that it be so revised and amended as to omit from the description therein said Farnsworth Ditch and Water Right," and "that the title to said ditch and water right be declared in the plaintiff as of fee simple, and that the defendant be adjudged to have no right, title, or interest therein."

The demurrer alleges that the complaint "shows that the plaintiff has been guilty of laches in bringing this action." The court has several times held, as stated in *Allen v. Blanche Gold Mining Co.*, 46 Colo. 199, 202, 102 Pac. 1072, 1073, that "the procedure in this jurisdiction requires the question (of laches) to be raised by answer, not by demurrer." In *Ballard v. Golob*, 34 Colo. 417, 429, 83 Pac. 376, 380, it is said:

"Moreover, it has repeatedly been held by this court that when laches is interposed as a defense to an action that the

proper procedure is to raise it by answer. This is upon the ground that the party against whom laches is charged shall have an opportunity to explain, and while a very great number of authorities hold that when such facts appear in a complaint that it may be taken advantage of by demurrer, we are committed to the other doctrine."

To the same effect are the following cases: *Price v. Immel*, 48 Colo. 163, 169, 109 Pac. 941; *French v. Woodruff*, 25 Colo. 339, 54 Pac. 1015; *Fairplay v. Park County*, 29 Colo. 57, 60, 67 Pac. 152.

The demurrer should undoubtedly have been overruled so far as any of its grounds raised the question of laches.

Another ground of the demurrer is that the complaint "pleads no equity," and under this head the defendant in error contends that the complaint shows that plaintiff "was negligent in the execution of the instrument" because he failed to read the deed of trust at the time of signing the same. In *Lloyd v. Lowe*, 63 Colo. 288, 165 Pac. 609, this court held, in a case where a grantee accepted a deed containing an assumption clause which was inserted in the deed contrary to the agreement of the parties, and without the knowledge of such grantee, that the fact that the grantee did not read the deed * * * does not charge him with negligence." It has been repeatedly held that the fact that a person accepts or signs an instrument without reading the same is not of itself a conclusive barrier to suit. 34 Cyc. 950. A party's failure to read a document may be excused "where, for any special reason, the one party imposed implicit trust and confidence in the other." 1 Black on Rescission and Cancellation, sec 56, p. 130. The complaint alleges that the plaintiff relied on the skill, capacity, integrity and honesty of Harding, an attorney at law and the agent of the grantee, who prepared the deed of trust. We think the complaint, under the authorities above cited, contains sufficient allegations to negative negligence, and, as said in 34 Cyc. 976, "when no negligence of complainant is shown, the bill is not demurable for want of equity."

It is alleged in the demurrer, as one of the grounds thereof, that the complaint "pleads matters of which this defendant had no notice, and could not have had notice," and that "there is nothing of record to place defendant upon inquiry as to the claim of plaintiff." This amounts to alleging that the complaint fails to show that the defendant was not a bona fide purchaser, and both sides argue the demurrer on the theory that such question is raised.

"To constitute a bona fide purchaser it is necessary that such purchaser must have parted with value, and that he must have taken without notice, actual or constructive." 34 Cyc. 958.

The plaintiff in error contends, in effect, that the complaint shows by its allegations that the defendant had constructive notice of the plaintiff's rights because, as alleged, the plaintiff had actual and exclusive possession of the ditch and water right in question. As a general rule possession of real estate is constructive notice of the title of the possessor. 39 Cyc. 1744. The general rule was expressed by this court in *Davis v. Purcell*, 55 Colo. 287, 299, 134 Pac. 107, 111, as follows:

"Possession of real estate, open and exclusive, is sufficient to put a would-be-purchaser upon inquiry, and constitutes notice of the interest the one in possession has in the fee, whether legal or equitable in its nature."

The doctrine is applied or mentioned also in the following: *Yates v. Hurd*, 8 Colo. 343, 8 Pac. 575; *Coffee v. Emigh*, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125; *Jerome v. Carbonate Nat. Bank*, 22 Colo. 37, 43 Pac. 215; *Runyan v. Snyder*, 45 Colo. 156, 100 Pac. 420.

The rule that possession is notice to subsequent purchasers has been applied in cases where, as here, the party having and alleging possession is the plaintiff in a suit to reform an instrument which purports to vest title to the land, so possessed, in another. *White v. White*, 105 Ill. 313; *Bayard v. Norris*, 5 Gill (Md.) 468, 46 Am. Dec. 647. In 39 Cyc. 1754, it is said:

"Where by fraud or mistake the deed includes land other than that intended to be conveyed, continued possession by the grantor is constructive notice to a subsequent purchaser from the grantee."

See also *Kentland Coal and Coke Co. v. Elswick*, 167 Ky. 593, 181 S. W. 181.

In the instant case the rule is sought to be applied to a ditch and water right. The right to use water for irrigation is real estate. *Davis v. Randall*, 44 Colo. 488, 99 Pac. 322. That a ditch is an easement has been frequently declared. I *Wiel on Water Rights* (3rd ed.), sec. 455, p. 480; *Blake v. Boye*, 38 Colo. 55, 88 Pac. 470, 8 L. R. A. (N. S.) 418. The doctrine of notice by possession applies to easements. 39 Cyc. 1751. We are of the opinion, therefore, that the doctrine is applicable to ditch and water rights. Practically the same reasoning is followed in *Neilsen v. Parker*, 19 Ida, 727, 115 Pac. 488, where the court held that the diversion and beneficial use of water from a stream is such a possession which gives actual notice to every intending appropriator of the water from the same stream. The court said: "It is like a man being actually in possession of realty; indeed, a water right is realty in this state."

The possession, described in the complaint, is such a possession as is required to give constructive notice under the rule above discussed. The fact that the ditch and water right is not actually used during winter months, does not prevent the possession and use from being continuous and uninterrupted within the meaning of the rule. I *Wiel on Water Rights* (3rd ed.), sec 583, p. 629; 1 *Words & Phrases* (2nd series), 975. The complaint also shows that the ditch and water right could not be, and never had been, used upon the land conveyed in the trust deed in question. This was another circumstance, added to that of the plaintiff's possession, which might be said to be sufficient to have put the defendant upon inquiry.

The complaint, so far as it attempts to set forth a first cause of action, is good as against the various grounds stated in the demurrer.

The second cause of action appears to be one wherein the plaintiff claims title to the ditch and water right by adverse possession. So far as the demurrer goes to this cause of action, it does not point to any valid reason why a cause of action is not stated. Most of the grounds of the demurrer in this respect are the same as those laid with reference to the first cause of action, and, like them, cannot be sustained, for reasons already discussed.

The demurrer questions the sufficiency of the second cause of action also upon the ground "that plaintiff is attempting to defeat his own conveyance." There is no merit in the demurrer in this connection. A grantor may originate a possession adverse to his grantee. 1 R. C. L. sec. 76, p. 752; 2 C. J., sec. 251, p. 145.

Furthermore, as stated in 32 Cyc. 1319,

"Equity will quiet title to that part of a tract of land included by mistake in a conveyance regular on its face, at least where complainant and his grantors have remained in possession ever since the conveyance was made."

We find no allegation in the entire demurrer which successfully shows wherein the complaint or any part thereof, is demurrable. We are of the opinion that the demurrer, for the reasons above named, should have been overruled, and that the court erred in sustaining the same. The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed.

Chief Justice Garrigues and Mr. Justice Bailey concur.

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ACCORD AND SATISFACTION.

Example. The acceptance of a check bearing an endorsement to the effect that it is "Payment in Full," is in effect an accord with satisfaction, and precludes a further recovery. *Colorado Co. v. Denver Club*, 418.

Payment and Acceptance of a Less Sum Than Claimed. A set-off of uncertain amount renders the debt unliquidated, although the amount thereof is not in dispute. And this, even though the counter claim grows out of a transaction other than that giving rise to the indebtedness asserted by plaintiff. *Stanley-Thompson Co. v. Southern Colorado Co.*, 587.

Evidence. The tender of a smaller sum than that claimed, with notice that it must be accepted in full satisfaction, or rejected, constitutes, if accepted, an accord and satisfaction. A voucher accompanied by a check bearing the indorsement, "Payee's indorsement will be considered an acknowledgment in full," being accepted by the payee, and collected, held to affect notice that the amount of the check was tendered in full satisfaction. *Id.*

Pleading—Waiver of Defects. No demurrer being interposed to the answer, and the cause being tried as if the issue of accord and satisfaction was presented, all objections to the answer were regarded as waived. *Id.*

ACCIDENT INSURANCE.

Policy Construed. An accident policy provided that the insurer would pay the insured "the respective indemnities set forth for loss resulting from accident in the principal sum of \$100.00, with accident indemnity at \$45.00 per month." By clause A, it was provided that the insurer will pay * * * "for loss of either foot, one-half the principal sum;" and by clause B, that the insurer should pay "for the total loss of time \$45.00 per month, for not exceeding 104 weeks." Held that the insured having lost a foot was entitled to recover only one-half the principal sum, as prescribed in clause A. A judgment allowing an award for time lost, under clause B, was reversed. *Van-Gilder v. Kingsberry*, 255.

Construction of Policy. All ambiguities are resolved in favor of the assured. *Finding v. Ocean Accident Co.*, 332.

Policy Construed. Insurance of the owner of a building against loss, by injury to any person in the car of an elevator, but excepting "any person engaged * * * in extraordinary repairs," but permitting ordinary repairs, "provided no elevator shall be run while it is undergoing such repairs." An employee of plaintiff was injured while riding upon the top of the car, engaged in cleaning the paint. Held not a repairing in the ordinary sense of the word, and that the insurer was liable. Exceptions couched in words of doubtful meaning are not favored. *Id.*

ACT OF GOD.

Negligence. A telephone company which fails to exercise reasonable care to protect its patrons from injury by an excessive current upon its wires, induced by lightning, will not be heard to excuse its neglect as resulting from the act of God. *Pearce v. Mountain States Co.*, 91.

APPEALS.

Appeal County to District Court—Docketing. If the clerk of the District Court upon receiving the transcript and files in a cause appealed from the County Court gives to the cause a number, entering it upon the Register of Actions, the appeal is docketed, though no docket fee is paid. A rule of the District Court requiring, at the initiation of every civil cause payment of a specified sum, to be applied to the costs, is without effect upon the question. *Drennen v. Johnson*, 381.

Bond. An appeal from the County Court to the District Court is not to be dismissed merely because the surety is disqualified by statute to enter into the contract of suretyship, nor because, the appellant being a corporation, the bond is subscribed by an officer not having authority—provided a good and sufficient bond is filed. (Rev. Stat. sec. 1539.) *Gibbs v. Security Bank*, 413.

APPEAL AND ERROR.

See PRACTICE IN ERROR.

APPROPRIATIONS.

Must Be Pursuant to Law. The compensation of a public officer must be prescribed by statute before it can be included in the general appropriation bill. So the expenses of a public officer must be the subject of an express statutory allowance, before an appropriation can be made therefor. *Leckeny v. Post Co.*, 443.

Injunction. A taxpayer may sue to restrain the payment of money under an appropriation made by the General Assembly in violation of the Constitution; and the District Court may award the injunction. *Id.*

Unlawful Allowance to a Public Officer is not justified or excused by a custom to make such allowance to his predecessors. *Id.*

BANKS.

Bank—Accepting Check Drawn Upon Itself. A bank is presumed to know whether a check drawn upon itself is good, and if it pays it, or credits it to a depositor's account, it will not be allowed to afterwards change its position and repudiate the check, without an agreement, express or implied, to the contrary. The evidence examined and the bank held justified in charging back to a depositor a check drawn upon itself, and for which the depositor had received credit. *Snyder v. Hamilton Bank*, 24.

BILLS AND NOTES.

Endorser—Notice of Dishonor. Where the parties to commercial paper reside in different places, notice of the dishonor must, if by mail, be deposited in the post in time to go out on the day

following the dishonor. (Rev. Stat. secs. 4567, 4570.) Delay while investigating the apparent erasure of a party's name on the paper not excused. *Emerson and Buckingham v. German American Co.*, 398.

CERTIORARI.

Questions Involved. On certiorari to review an order of an administrative body the only questions presented are, did the board exceed its jurisdiction, or abuse its discretion? The merits of the controversy are not involved. (Rev. Code sec. 331.) *State Medical Examiners v. Noble*, 410.

CHATTEL MORTGAGE.

Of Merchant's Stock, with provision that until default the merchant shall retain possession, "and use and enjoy the same," is void, as against creditors and subsequent purchasers, even as to the fixtures where these are included. *Sharp v. Hollister*, 110.

Second Mortgage Subject to First. Such mortgage is valid between the parties, and valid as against a second mortgagee of the same tenor, "subject to" the first. The second mortgagee in such case is not to be regarded as a creditor or purchaser for value. *Id.*

Unplanted Crop. A chattel mortgage of a crop to be grown from seed not yet planted confers upon the mortgagee an equity, effective only by possession taken before the right of any innocent purchaser or incumbrancer has intervened. The record of such mortgage is not notice thereof. *First National Bank v. Felter*, 370.

CHURCHES.

Meetings Of.

See SOCIETIES.

COMMON CARRIERS.

Of Passengers—Passenger—Who Is—Contract Construed. Action upon a policy against accidents sustained "while the insured is a passenger in a public conveyance provided by a common carrier for passenger service." Plaintiff was the attorney of a railway company, but enjoyed other clients, and maintained an office separate from that of the company. At the time of the injury he was riding in a railway auto car operated by the railway company partly for the accommodation of its officials and partly for the carriage of passengers for hire, and was traveling upon a free pass, partly upon the business of the railway company, and partly upon the business of other clients. Held that he was a passenger within the meaning of the policy. *United States Co. v. Ellison*, 253.

Responsibility for Freight After Completion of the Carriage. A railway company which has completed the carriage of goods to destination is thereafter bound to no more than ordinary diligence in their care. *Lynch v. Union Pacific Co.*, 152.

After Delivery. A carload of vegetables had reached destination, and the consignee had paid the freight, accepted delivery, assumed the care, and, having constant access to the car, was

daily removing the vegetables. He had thus continued for seven days. Held that the railway company was not liable for the subsequent freezing of the vegetables. *Id.*

CONSTITUTIONAL LAW.

General Assembly—Delegation of Power. The state has inherent power to regulate and control public utilities operating within its limits, and the General Assembly may delegate this authority to a commission, and authorize such commission to permit the discontinuance of service upon a public railroad, and the dismantling thereof. *People ex rel. v. Colorado Title &c. Co.*, 472; *Public Utilities Commission v. Colorado Title &c. Co.*, 472.

Due Process of Law. Statutes creating presumptions, shifting the burden of proof, or declaring what shall be *prima facie* evidence, are within the legislative competency. A statute declaring that general reputation shall be evidence of the character of the house as a house of ill fame is not an interference with the property right of the proprietors without due process of law. *Gregg v. People*, 391.

Police Power—Limitations Of. The right to follow a lawful calling is a property right, and can not be abridged by any exercise of the police power, unless (1) the interests of the public generally require such interference, and (2) that the regulations proposed are reasonably necessary, and not unduly oppressive upon the individual. *Wilson v. Denver*, 484.

CONTRACTS.

Validity—Public Policy. A promissory note and a mortgage of lands to secure it, given for the purpose of suppressing a criminal prosecution against the mortgagor, is void as against public policy. *Bartle v. Bond*, 367.

Consideration. The Reverend Thomas A. Uzzell was for twenty-eight years the pastor of the People's Tabernacle Church in Denver. For the most of this time he received a salary varying from \$50.00 to \$150.00 per month—for the greater part of the time much less than \$150.00. During a portion of the time, holding a public office, he received no salary. The money for the payment of his salary, for the other expenses of the society, and for the purchase of certain real estate were obtained by his efforts from those not associated with the church, but who contributed through confidence in the pastor, and an appreciation of his work. Beginning with nothing, the organization, through his efforts, were possessed of a church building worth \$50,000, three other lots adjacent thereto, not used for religious purposes, \$1,700 in the treasury, and owed no debts of consequence. During his last illness, at a meeting of the society duly called, it was voted by a large majority to convey to the pastor the three lots adjacent to those on which the church was situated. The president of the board having conveyed to him but two of the lots so designated, after the death of Uzzell, at a meeting duly called, the society voted, again by a large majority, to convey all the three lots adjacent to the church to his heirs. The conveyance was supported, as upon sufficient consideration. *Uzzell v. McClelland*, 324.

Construed. Contract for the excavation of a tunnel, the mine owner reserving no more control of the work than necessary to enable him to secure due performance of the contract, creates the relation of independent contractor, and not that of master and servant. Mere suggestions of the mine owner as to matters of detail, adopted and followed by the contractor, as a concession, and not as a matter of obligation, do not change the result. Nor does the occasional employment by the mine owner of miners working under his control, in order to hasten the work. *Industrial Commission v. Maryland Co.*, 279.

Construed. One contemplating the purchase of real property makes a deposit with the agent offering it for sale "to be held" by such agent, during the proposed purchaser's examination, and until he is "satisfied" that the premises are as represented. Held to imply that the deposit is to be returned if the purchaser is not satisfied of the truth of the representations made to him. The agent is bound by his contract to return a deposit made with him whenever the conditions entitling the purchaser to the return under his contract are shown. *Prochnow v. Cox Loan & Co.*, 580.

Written Contract—Cotemporary Parol Contract With Another. A written contract by the owner for the sale of real property has no effect upon a parol contract between his agent and the proposed purchaser. Plaintiff suing to quiet title to a water right produced a writing subscribed by one Lock, the original proprietor of the ditch, declaring that he had sold to parties named, the same from whom plaintiff produced title, "an undivided half interest in the ditch." There was no evidence that Lock owned any other ditch which could have supplied water to the premises of those named in the writing as vendees. Held it was to be presumed that the writing referred to the single ditch so owned by Lock. *Love v. Cotten*, 593.

Non-Performance. One can not complain of the non-performance or defective performance of a contract occasioned by his own act or default. *Burrell v. Masters*, 310.

CONTRIBUTORY NEGLIGENCE.

Sudden Peril. A party confronted by sudden peril from the negligence of another is not to be charged with contributory negligence for every error of judgment where instantaneous action is required. *Lebsack v. Moore*, 315.

For Jury. Action by servant against master for an injury attributed to negligence. Defense contributory negligence. The evidence being such that different minds might honestly draw different conclusions, *held* the question was for the jury and that defendant's motion for a directed verdict was properly denied. *Bundy v. Wiscamb*, 88.

CONVEYANCES.

Delivery. The voluntary delivery of a conveyance of lands by the grantor to the grantee is effectual, though the grantee is not, at the time, informed of the contents or purpose of the paper so delivered. *McGowan v. Lockwood*, 264.

Acceptance by the grantee is presumed where the delivery is unconditional, and the conveyance beneficial. *Id.*

Record is notice only as to the lands described therein. *Wedman v. Carpenter*, 63.

Destruction of, by the grantor, at request of the grantee, re-invests the grantor with title where this is the intent of the parties. *Tallman v. Huff*, 128.

CORPORATIONS.

By-Laws—Validity. Is determined by the same tests as the validity of a contract. *Burns v. Wray Co.*, 425.

Restraint of Trade. It is not necessary to the invalidity of a by-law that it was deliberately framed with the intent to suppress competition. Nor that its result is a monopoly. The by-laws of a corporation dealing in grain provided that any stockholder selling grain to a competitor of the corporation should pay to it one cent upon each bushel so sold. *Held* an unreasonable restraint of trade. *Id.*

CRIMINAL LAW.

Manslaughter—Verdict. Notwithstanding the provisions of sec. 1629 of the Revised Statutes, the court presiding in the trial of the alleged homicide may exclude from the jury the question of involuntary manslaughter, where there is no evidence of that degree of the crime or the defense is upon a theory having no relation thereto. The question is solely for the court. *Sevilla v. People*, 437.

Burglary of Dwelling—Ownership. Under Rev. Stat. 1675, breaking into an unoccupied house is burglary. The ownership is properly laid in an agent having general charge and control of the premises. *Sloan v. People*, 456.

Perjury. One who offers himself as surety in a bail bond, makes, before a notary, a false affidavit as to his financial condition. He is guilty of perjury. *People v. Pollock*, 275.

Embezzlement is common law larceny extended by statute to cases where the stolen goods come into the hands of the accused without a trespass. *Moody v. People*, 339.

Embezzlement of Writing—Information. Where the thing embezzled is a writing, it must be described with reasonable certainty, or a sufficient reason must appear for the omission of particularity. "One bank check of the value of," etc., "the property of," etc., held fatally insufficient. *Id.*

Bawdy House—Injunction. Under c. 123 of the Acts of 1915 the owner of premises may be enjoined from permitting the use thereof as a brothel. That the owner had nothing to do with the keeping of the house is immaterial. The purpose of the statute is to abate the nuisance by stripping it of its furniture, fixtures and equipment. The owner may if he can establish his innocence. *Gregg v. People*, 391.

Parties. The owner of the premises, as well as keeper of the brothel, may be made defendant. The owner can not complain if the tenant is not made party. *Id.*

Equity Jurisdiction. The statute provides a civil action in aid of criminal process. The power of the legislature to so extend the jurisdiction of equity is well established. The defendant is not entitled to a trial by jury. *Id.*

Bigamy—Five Years' Absence of Former Spouse—Statute Construed. Defendant deserted his family, leaving them in Nebraska, in 1903, where they continued at their then residence until 1913. Defendant's second marriage occurred in less than two years after the first wife's departure from the former matrimonial domicile. Held that while remaining at such former domicile the first wife was not "absent," within the meaning of the statute (Rev. Stat. sec. 1766), and a conviction was affirmed. Whether the husband, at the time of the second marriage, knew that the first wife was living, or did not know it, was held immaterial. *Schell v. People*, 116.

Information—Sufficiency. An indictment or information which describes the offense in the language of the statute, or so plainly that what is charged may be readily understood by a jury, is sufficient. An information charging the accused with having obtained from a prosecutrix a sum of money by falsely and fraudulently representing to her that a certain tract of land which he exhibited to her was a specified quarter section, and public land, contrary to the fact, held sufficient to sustain a conviction. *Tracy v. People*, 226.

Information. An information charged the accused with unlawfully bringing into the state, at a county named, for unlawful purposes, intoxicating liquors. Held sufficient under Rev. Stat. sec. 1950. The liquors need not be actually delivered to constitute the crime, nor need the information name the person to whom they were to be delivered, nor the purpose or place. *Highley v. People*, 497.

Information—Objections to, not challenged until after verdict, will not be considered on error. *Doyle v. People*, 124.

Jury—Challenge to the Array. Information for the sale of intoxicating liquors. That the sheriff sent the prosecuting witness to the establishment of the accused to make the purchase, giving him money for the purpose, is no ground of challenge to the array. *Id.*

Evidence—Wife Against Husband—Competency. The wife is a competent witness against the husband in a prosecution for bigamy. The offense is a crime against the wife within the meaning of the statute. (Rev. Stat. sec. 7274.) *Shell v. People*, 116.

Cross-Examination of Accused as to a Former Conviction. The accused, testifying in his own behalf, may, on cross-examination, be asked, in the language of the statutes, if he has been convicted of a "crime." Accused, failing to give a direct answer, may be further cross-examined, in the discretion of the court. The jury should be charged that the fact of his conviction goes only to his credibility. *Dennison v. People*, 15.

Other Crimes. A crime other than that charged, but so similar in character and so closely connected therewith in time that a

like motive may be fairly imputed to each transaction, is admissible to show the intent. *Tracy v. People*, 226.

Evidence of Other Crimes, committed about the time of the offense charged, and of similar character, is admissible upon the question of intent. The evidence examined and held sufficient to warrant the reference thereto, in the charge, as "evidence of other crimes." *Meyers v. People*, 450.

New Trial—Single Witness Discredited. A conviction of crime upon the unsupported testimony of a single witness who was manifestly entirely mistaken as to a controlling fact vacated. *Parmalee v. People*, 584.

Trial—Order of Proof, is largely in the discretion of the trial court. Where the names of certain witnesses examined in rebuttal were upon the indictment, it was held that there was no abuse of discretion, though the testimony might be regarded as part of the case in chief. *Tracy v. People*, 226.

Instructions—Assuming Matter in Issue. Indictment for larceny of live stock. There was evidence that the accused had taken the animals in question into his possession and branded them. Being charged with their larceny, he had afterwards, before initiation of the prosecution, surrendered them to the one alleged to be the owner. An instruction which told the jury that if they believed beyond a reasonable doubt that defendant had taken the animals, with intent to steal, etc., they should find him guilty, though he "afterwards returned them to the owner." Held an assumption of ownership in another, and fatal error. *Peterson v. The People*, 106.

Instructions—Not Requested, failure to give is not error. *Sevilla v. People*, 437.

Reasonable Doubt. The accused is entitled to an instruction that if the jury entertain a reasonable doubt as to whether on assuming possession of the chattels alleged to be stolen, and asserting title thereto, he acted in good faith, they should acquit. *Peterson v. People*, 106.

An instruction which tells the jury that "they have no right to disbelieve as jurors, if they believe as men" is fatal error. *Highley v. People*, 497.

Fair Trial—Time for Argument. The general rule is that the time to be allowed for the argument of counsel is in the discretion of the presiding judge. The court found itself unable to say that a limitation of forty minutes was an abuse of discretion. *Schell v. People*, 116.

Verdict—Effect. A verdict of guilty raises a presumption that everything necessary to a conviction was established by the evidence. *Doyle v. People*, 124.

Sentence, construed in connection with remarks of the presiding judge, as not involving the punishment of the accused for an offense not charged. *Myers v. People*, 450.

Discharge Under Habeas Corpus Act—Effect. The liberation of an accused person under Rev. Stat. sec. 2926 is not an acquittal. He may be again indicted and tried for the same offense. *People v. Henwood*, 566.

Error—What May Be Assigned for Error. Not an objection to the verification of the information, where no objection was made below. *Schell v. People*, 116.

An accused person who makes no peremptory challenge can not on error brought complain of the manner in which the jury was summoned. *Doyle v. People*, 124.

Error—Examination of the Evidence. Where there is evidence to support a conviction, the court of review will not consider its weight. *Dennison v. The People*, 15.

CUSTOM.

Unlawful Allowance, to a public officer, is not justified by custom. *Leckanly v. Post Co.*, 443.

DAMAGES.

Parents' Action for Child's Death—Experience of Jurors. An instruction directing the jury to consider, in determining the allowance to the parent, the age, health, mental and physical condition, and the disposition and ability of the child to be of aid to the parent during its minority, as well as the probable expense of rearing and educating the child, and declaring that the jury were at liberty to refer to their personal observation, knowledge, and experience, in like cases, approved. The difficulties attending the inquiry set forth and enlarged upon. *Tadlock v. Lloyd*, 40.

Funeral Expenses of the Child are a proper element of damage under the facts of this case. *Id.*

Excessive. A verdict of \$12,075.00 held not to evidence passion or prejudice on the part of the jury. *Rio Grande Co. v. Campbell*, 217.

A lady of 24 years, and earning a salary of only \$40.00 per month, sustained, by the negligence of defendant, an injury resulting in an amputation of one of her lower limbs below the knee. She was awarded \$17,000 as damages. There was nothing in the record to evidence passion or prejudice on the part of the jury. The court refused to disturb the verdict, even though upon a former trial the award was but little more than one-half that in question. *Colorado Springs &c. Co. v. Kelley*, 246.

DEFAULT.

Vacating—Discretion. The courts of Nisi Prius have a wide discretion in relieving against defaults. *McPhail v. Denver*, 578.

DISTRICT COURT.

Lunatics—Appeal from County Court—Jurisdiction. Section 11 of c. 173 of the Laws of 1915 is opposed to the provisions of sec. 28 of art. VI of the Constitution and is void. The provisions of sec. 163, c. 181 of the Laws of 1903 (Rev. Stat. sec. 7254) are still in full force, and the District Court has jurisdiction of an appeal from the County Court in a controversy involving the estate of a lunatic. *In Re Estate of Brown, Lunatic*, 341.

ELECTIONS.

Irregularities Not Affecting Result Disregarded. At a municipal election certain citizens of the town were refused the ballot, but if all had voted in the negative, and their votes had been accepted and counted, the proposition still would have been carried. Held, their exclusion was no ground to set aside the result. *Loveland v. Western Co.*, 58.

ELECTRICITY.

Duty of Those Conducting and Using. A telephone company is bound to know that its wires may become charged with a dangerous current, induced by lightning, and it is under a duty to use reasonable care to guard against possible fire, resulting from such excessive current. If after the installation of its instruments in a patron's premises, a change in the condition of such premises occurs, and such change is known to the company, or might be known by the exercise of reasonable diligence, it is under duty to use reasonable care to effect any improvement in its appliances, necessary to the safety of the premises from any danger occasioned by the change. *Pearce v. Mountain States Co.*, 91.

EQUITY.

Jurisdiction. The legislature may authorize an injunction, in aid of criminal process. *Gregg v. People*, 391.

Cancellation of Contract. An instrument void upon its face is harmless. Judicial cancellation is not necessary. *Gunter v. Walpole*, 234.

Reformation of Writings. The party complaining is not barred of relief by the circumstance that he executed the paper without reading it. *Hitchens v. Milner Co.*, 597.

Bona Fide Purchaser—Protected in Equity. Equity will not reform an instrument to the injury of a *bona fide purchaser*. *Wedman v. Carpenter*, 63.

To constitute one a bona fide purchaser, he must have parted with value, without actual or constructive notice of the right of another. *Hitchens v. Milner Co.*, 597.

Parol Gift of Lands. will be enforced in equity only where, in reliance thereon, valuable improvements have been made. *Kendall v. Metroz*, 387.

Laches—Pleading. The defense is presented only by answer. *Hitchens v. Milner*, 597.

ESTOPPEL.

By Contract. The Cooper Company leased to the Shubert Company premises upon which the latter proposed to erect a theatre. The lease provided that the lessor to secure the payments stipulated to be made by the lessee, should have a lien paramount to all others upon the interest of the lessee. The Shubert Company issued a series of bonds secured upon the property by assignment of the lease to a trustee, and agreed with

the bond holders that the leasehold and building should not be incumbered except upon the written consent of the owners of two-thirds of the bonds outstanding. After bonds to a very large amount had been sold, the lessor, lessee, and trustee, entered into a supplemental agreement to the effect that "the bonds issued by the lessee upon any building upon said premises shall be first lien upon said lease and buildings." Later, the building being still incomplete, the Shubert Company without funds, and largely indebted, and it being impossible to find a further market for the bonds, the trustee, and more than the required proportion of the bond holders consented to the execution by the Shubert Company of a mortgage to secure \$120,000, to relieve it of its indebtedness. The mortgage being executed, and this sum being advanced by plaintiff the Shubert Company resumed building, but later defaulted in the ground rent, and in interest upon the loan, whereupon the Cooper Company brought its bill to foreclose the mortgage. Certain bond holders then filed a petition in intervention claiming a lien by virtue of their bonds, prior and superior to the mortgage, contending in argument that the Shubert Company at the date of the execution of the mortgage had no right, title or interest in the premises, nor any valid power to execute a mortgage thereon, and that the mortgage was void. *Held* that the mortgage having been executed with the consent of every one having an interest in the premises, was as effectual and binding upon every bond holder as if he or she had personally subscribed the consent to its execution. *Lewis v. Cooper Company*, 297.

To Deny Jurisdiction. The defendant to an action cannot be estopped to deny the existence of a fact, which under the statute, is a prerequisite to jurisdiction. *Stacks v. Industrial Commission*, 20.

EVIDENCE.

Judicial Notice Taken of all the pleadings filed in the cause. *Ady & Crowe Co. v. Howard*, 272.

Presumptions. A corporation operating appliances for the conduct and employment of electricity is presumed to have special knowledge and skill, which it is its duty to exercise for the protection of its patrons. *Pearce v. Mountain States Co.*, 91.

Burden of Proof. In an action upon contract the plaintiff has the burden of proving that the contract was as he alleges; he is not required to negative the defendant's allegation of an additional condition. *Ver Straten v. Leftwich*, 468.

Competency. A witness is not excluded under sec. 7267 of the Revised Statutes, where he has no interest in the suit in which his testimony is offered, even though he is concerned in a different suit, involving the validity of a contract, upon which depends the suit in which he is offered. *Love v. Cotten*, 593.

Witness—Competency—Executrix Party. One who, being sued both in her individual capacity and as executrix, defends solely in her individual right, cannot exclude the testimony of plaintiff (Rev. Stat. sec. 7267.) *Gabrin v. Brister*, 407.

Competency. The admission in evidence of a self-serving memorandum, made by the party succeeding below, and probably decisive of the issue, *held error. Engelbach v. Kellog.*

Parol Inadmissible. Declarations of the insured in a life policy are not admissible to vary the terms of such policy as to the beneficiary, or create a trust as to the proceeds in favor of a third person. *Fee v. Wells*, 348.

Self Serving Declarations—Book Entry. Where the terms of a parol contract are in question an entry in the day book of one of the parties is inadmissible to establish his contention. *Weston v. Wilkes*, 422.

Secondary Evidence—Copy of Writing. To receive in evidence a copy of a letter alleged to have been written by plaintiff to the defendant, without sufficient notice proved to produce the original, is error. *Weston v. Wilkes*, 422.

Expert Testimony. Action by one injured while driving a coal car in defendant's mine, the injury being attributed to the defective condition of the mine. *Held* that the opinions of one qualified to speak of the matter, as to whether the entry in which plaintiff was employed was a reasonably safe place, was properly received. *National Fuel Co. v. McNulty*, 176.

The true test as to the admissibility of expert testimony is not whether the matter in question is common or uncommon, nor whether many persons or few, have some knowledge of it, but whether the witness called as an expert has any peculiar knowledge or experience which renders his opinion of aid to the court or jury in determining the question at issue. The case of *Smuggler Union Company v. Broderick*, 25 Colo. 16, is not authority for the exclusion of expert testimony in the proper case. *Id.*

Examination of Parties—Scope. Defendant being called as a witness for plaintiff, the court, over the objection of plaintiff, permitted his cross examination upon other matters than those to which he had been interrogated in chief. *Held* a mere question of the order of proof, and within the discretion of the court. *Brunton v. Stapleton*, 577.

Party Discrediting His Own Witness. A witness called by the District Attorney in rebuttal to impeach or discredit the accused declines to do so. The District Attorney, though surprised by this refusal, is not to examine the witness as to irrelevant matters tending to besmirch or discredit her. *Graff v. People*, 489.

EXECUTORS AND ADMINISTRATORS.

Administrator's Sale—Effect. An administrator's deed or bill of sale conveys only the title of his decedent. The maxim *caveat emptor* applies. In the absence of any special agreement as to the title, the purchaser must examine for himself.

One having a better title is at liberty to assert it in the courts, and in so doing is guilty of no contempt of the court which ordered the sale. *Payne v. People*, 75.

FALSE IMPRISONMENT.

Evidence. One claiming to be a city detective called upon plaintiff, told her he was a detective, had a complaint against her, and was told to get her, that he could put her in jail, but would take her where she might meet the man who made the complaint. He ignored her protests of innocence, and insisted that she go with him. *Held*, an arrest and false imprisonment. *Kettelhut v. Edwards*, 506.

Ratification of Arrest. One who approves an unlawful arrest made by another is liable to an action for false imprisonment. *Id.*

FENCES.

Fence Law—Trespassing Livestock—Liability of Owner. Under Rev. Stat. sec. 2589 the owner of livestock turning the same at large upon the public highway, is not liable for their invasion of private lands of another who fails to maintain a lawful fence, nor for their trespasses therein, even though he expects that such trespasses shall be committed. *Williamson v. Fleming*, 58.

FRAUD.

Relief Against. A promissory note and a deed of trust upon land, securing it, were obtained by fraud. In an action against one who obtained the note after maturity, a judgment cancelling both the note and the deed of trust was affirmed. There being, under the circumstances of the case, no other relief possible, that the action was in tort, for damages, was held no bar to this equitable form of relief. *Carlson v. Rensenk*, 11.

False Representations Recklessly Made, even though without knowledge of their falsity, entitles one who acts in reliance thereon, to his injury, to relief. *Carlson v. Akeyson*, 35.

Plaintiff's Failure to Investigate, excused, in view of the circumstances of the transaction shown in the record. *Carlson v. Akeyson*, 35.

Pleading. One seeking the cancellation of a promissory note, the execution of which was obtained by fraud, need not always aver in express terms that he would not have executed the document but for the false representations.

The complaint averring that plaintiff "relied upon the representations of defendant, and thereupon at request of defendants executed the note," with other allegations to like effect was held sufficient.

If it is manifest that the false representations were material to the transaction this need not be expressly averred. *Carlson v. Akeyson*, 35.

A complaint alleging fraudulent representations as to the financial condition of a corporation, inducing the purchase of stock therein, sustained. *Whitt v. Orchard Products Co.*, 585.

Tender of Thing Received by Plaintiff, need not be expressly averred. Where, such tender being made at the trial it is refused by defendant upon grounds manifesting that it would have been refused, even if made previous to the institution of the action, the omission to make or aver a tender, in the beginning, was held unimportant. *Id.*

A *Bad Bargain*, not induced by any misrepresentation affords no grounds for complaint. *Fraser v. Walker*, 126.

FRAUDULENT CONVEYANCES.

Intent to Delay Creditor. One who disposes of his property merely to delay his creditors, or a particular creditor, exposes himself to an attachment, even though he intends to faithfully discharge all of his obligations. (Rev. Code. sec. 98.) *Kalberer v. Wilmore*, 411.

Relief of Creditor. A creditor may assail a conveyance made in fraud of creditors, without first recovering judgment upon his demand. *Chalupa v. Preston*, 400.

Evidence—Burden of Proof. In a transaction between relatives or those connected in marriage, the parties thereto have the burden of establishing its innocence and integrity. The evidence examined and held to establish that the conveyance assailed was without consideration and with fraudulent intent. *Chalupa v. Preston*, 400.

HUSBAND AND WIFE.

Living Apart—Family Expenses. Where the wife lives apart from the husband, with the children, the liability of the husband for raiment furnished to the children without his authority, depends upon common law principles, the statute regarding family expenses (Rev. Stat. sec. 3021) has no application. *O'Brien v. Galley-Stockton Co.*, 70.

INDUSTRIAL COMMISSION.

Procedure—Evidence. The Commission should first ascertain the extent of the disability, and whether permanent or not. If the disability is ascertained to be permanent they should ascertain the life expectancy of the claimant as an aid in fixing the aggregate due the claimant under the statute. *Employers' Co. v. Industrial Commission*, 284.

Allowance—Amount. The only restriction made by the statute upon the allowance to claimant, is as to the weekly stipend which is not to exceed \$8.00. *Employers' Co. v. Industrial Commission*, 284.

Allowance Not to be Enjoined. Payment of the weekly allowance is not to be stopped by injunction, pending a controversy over its propriety, or the amount. *Id.*

Authority. Under sec. 57 of the Workmen's Compensation Act (Laws 1915 c. 179) the Commission have authority to award compensation in a lump sum to a workman who is totally and permanently disabled. *Karoy v. Industrial Commission*, 239.

Upon the application of an injured workman for compensation, at a time so near the incurring of the injury that the ex-

tent thereof cannot be satisfactorily ascertained, the Commission may make an allowance, and give leave to the workman to apply at a later day for further compensation.

If upon further hearing new disabilities are manifest the Commission may make new findings, and an increased award.

It appearing upon a second hearing that the claimant had suffered an injury usually fatal, that his sight and hearing were impaired, that he was affected with vertigo and headaches, and entirely unable to follow his usual calling, and that this condition would probably be permanent, a finding that he had suffered a loss of twenty-five per cent of his earning capacity, and an increased award accordingly, was approved. *Employers' Co. v. Industrial Commission*, 284.

Action to Vacate Award or Finding. Under sec. 77 of the Workmen's Compensation Act (Laws 1915 c. 179) no action lies to vacate or amend a finding or award of the commission unless the party complaining has first applied to it for a rehearing. *Stacks v. The Industrial Commission*, 20. Refusal of the commission to hear oral argument, after an order made, is not sufficient to support an action to vacate such order. *Id.*

INJUNCTION.

When Allowed. Not to restrain payment of an allowance made by the Industrial Commission to an injured workman. *Employers' Co. v. Industrial Commission*, 284.

In Aid of Criminal Process. May be allowed by the legislature. *Gregg v. People*, 391.

INSTRUCTIONS.

Definition, of words of well-known import not required. *Brunton v. Stapleton*, 577.

Assuming Matter in Issue. An instruction assuming as a fact, vital matter which is in issue, is error. *American Co. v. Erlich*, 545.

Not Applicable to the Issue. Action by parent for the death of a child, attributed solely to the neglects of the physician to give proper attention to his patient. An instruction that the possession of skill by the physician raises no presumption of its exercise, held not prejudicial, the question to which the instruction is directed not being involved. *Tadlock v. Lloyd*, 40.

INTEREST.

Money Wrongfully Detained. Dewey, the conservator of a non-resident lunatic, refused to turn over to the guardian appointed at the home of the lunatic, moneys in his hands pertaining to the estate. A portion of these moneys was upon deposit in a bank of which Dewey was the cashier, evidenced by certificates of deposit which bore the legend "no interest after maturity." Both Dewey and the Bank were held liable to the foreign guardian, for interest upon the certificates of deposit from the day of demand, also for interest, from the same date,

upon an open account in the bank; and Dewey was held liable for interest, which he had collected, on certain bonds pertaining to the estate. *Craig v. Dewey*, 362.

INTOXICATING LIQUORS.

Forfeiture of. There is no authority in law for the destruction of intoxicating liquors found in possession of, and claimed by, a citizen, by judgment of forfeiture, without trial. *Noble v. People*, 509.

Burden of Proof. The people, seeking condemnation and destruction of intoxicating liquors, have the burden of showing that the liquors were kept for an unlawful purpose. Only where the evidence warrants a finding of all the facts necessary to constitute a forfeiture, is the property right in the liquors forfeited. *Id.*

Liquors Acquired Before the Statute Took Effect, and stored in a private house, having no connection with, or used as, a store, shop, hotel, boarding house, rooming house, or place of public resort, are not, in view of the exceptions contained in the statute, to be regarded as kept for an unlawful purpose, merely by reason of the excessive amount or quantity thereof. *Id.*

Pleadings—Motion for Judgment Upon. Proceeding to condemn and destroy intoxicating liquors. The defendant pleaded purchase before the taking effect of the prohibitory act. (Laws 1915, c. 98), for their personal use, and that they stored the liquors in the private residence of one of them, no part of which was connected with or used as a store, shop, hotel, boarding house, rooming house, or place of public resort. Motion for judgment on the pleadings admits these allegations and the allowance of the motion was held error. *Id.*

The purpose of the action being to secure the condemnation and destruction of certain intoxicating liquors, two citizens claiming the liquors were named as defendants. Although the only judgment prayed was the destruction of the liquors, the case was tried as an action of replevin. The court says that if again tried as an action of replevin, without reforming the pleadings, the individual claimants of the liquors should be treated as plaintiffs; that if the evidence should warrant a finding of fact that the property in the liquors had been forfeited under the statute there could be no recovery by the individual claimants, because in the case supposed, they would have no title or right of possession, and they recover only upon the strength of their own title; that if the liquors were shown to be placed in the private residence of one of the defendants before the prohibitory statute went into effect, and there remained, and that the house was within the exception mentioned in the statute, the quantity of liquor would be no evidence of violation of the statute; and finally that although the package was not marked as containing intoxicating liquor, while being removed by one of the claimants from the place of deposit to his own private residence, this would not work a forfeiture. *Id.*

IRRIGATION.

Overflowing Stream. Under the statute (Rev. Stat. sec. 3202) a natural stream may be used for conveying appropriated water, but one so using the stream must make sure that the flow does not rise above the danger point.

Where several irrigating companies operate their properties together, and substantially as one, each is liable for injuries occasioned by an overflow in a stream, due to one of those so associated. *Larimer and Weld Co. v. Walker*, 320.

IRRIGATION DISTRICTS.

Right to Purchase Land at Tax Sale. Lands sold to the county for taxes are excepted from the provisions of c. 109 of the Acts of 1915. Such lands are not to be sold at all for taxes until by redemption or sale the county is made whole. *Henrylyn District v. Patterson*, 385.

Directors—Disabilities. The directors may not employ one of their number as secretary, or superintendent, of the district. Warrants issued to a director for his salary in such position are void. *Interstate Co. v. Steele*, 99.

Bonds—Recitals of, are not to be disputed. *Id.*

Bona Fide Holder. Warrants of an irrigation district issued in payment of an obligation for which the district was liable are valid in the hands of one who receives them in the usual course of business, without notice of any defect in the title. *Id.*

Warrants Issued for a Lawful Claim not Verified. Warrants of an irrigation district were issued for expenses incurred in the organization of the district, and confirmation proceedings, *Held* not invalidated by the circumstance that these claims were not verified. *Interstate Trust Co. v. Steele*, 99.

In view of the broad provisions of sec. 3450 of the Revised Statutes, sec. 3463 is not to be held mandatory. *Id.*

Promise of Third Party to Redeem. Nor are such warrants invalidated by the circumstances that they are issued because of, and upon the faith of the promise of a third person to redeem them. *Id.*

JUDGMENT.

Conclusive Effect. A judgment is final and conclusive as to a question properly involved in the action, and which might have been raised and determined therein. Plaintiff and defendant were shareholders in a corporation which was declared a bankrupt, and the property of which was sold in the bankruptcy proceedings. In January, 1909 they entered into an agreement with others, creditors of the bankrupt, providing that the stock of a mining corporation which had acquired the properties of the bankrupt, at the sale thereof above mentioned, should be divided among the parties to the agreement, in proportion to their claims against the bankrupt corporation, but upon condition that each of the parties agreeing should pay into a bank named a specified proportion of the cash capital of the new corporation. Plaintiff never made the payment required by this agreement.

Defendant acquired title to certain mining properties formerly held by the bankrupt corporation, under a sale thereof, pursuant to the powers contained in a trust deed executed by the new corporation. The latter corporation was afterwards, in its turn, declared a bankrupt and the trustee in bankruptcy, presented in the court in bankruptcy a petition for an adjudication of the status of the property. To this petition the plaintiff filed an answer claiming to be a stockholder in the last bankrupt corporation, under the agreement of January, 1909, and alleging that the deed of trust under which defendant was claiming, was void. The court in bankruptcy declared the deed of trust valid, the sale thereunder regular, that the agreement of January, 1909, was never executed, and that plaintiff never became a stockholder thereunder, in the last corporation. Plaintiff thereupon brought this action, asserting that the agreement of January, 1909, constituted the parties thereto partners, and that defendant's purchase at the sale under the deed of trust was for the common benefit of all the parties to that agreement. *Held* that this contention might have been submitted to the court in bankruptcy, and therefore, the judgment of that court concluded the matter. *Hoover v. Catrow*, 17.

Action upon promissory notes. On the same day with its institution plaintiff brought replevin to recover certain chattels, mortgaged to secure the payment of the notes, and recovered judgment by default therein. Inasmuch as there was no answer in the action of replevin, no judgment could have been given save for the property demanded in the complaint. The judgment in the action in replevin was therefore no bar to the action upon the notes. *Gibbs v. Security Bank*, 413.

Lien of, stands upon the same footing as that of a purchaser in good faith; and upon the question of good faith the judgment creditor and the purchaser are subject to the same tests. *Wedman v. Carpenter*, 61.

Not Sustained by Evidence, must be reversed. *Antero, etc. Co. v. Park County*, 375.

Record—Clerical Mistakes in, may be corrected at any time. *Bessemer Co. v. West Pueblo Co.* 258.

Evidence of Mistake. The mistake may be established by any pertinent and satisfactory evidence, parol or otherwise. *Id.*

JURISDICTION.

Estoppel to Deny. Defendant can not be estopped to deny the existence of a fact, which by statute is a prerequisite to jurisdiction. *Stacks v. Industrial Commission*, 20.

JURY.

Functions. The jury are not judges of the law and facts. *Highley v. People*, 497.

Summoning. Most statutes for summoning juries are, as to the process provided, merely directory. Strict compliance therewith is not required.

The method prescribed by the statute for securing a jury is not exclusive. *Doyle v. People*, 124.

Open Venire. In the absence of a showing to the contrary it is assumed that the facts authorizing the court's action existed. *Id.*

JUVENILE COURT.

Criminal Jurisdiction. The Juvenile Court has no jurisdiction of the crime of rape even committed upon the person of an infant child. *In re Songer*, 460.

(Laws of 1907 c. 149.)

LIFE INSURANCE.

Hazardous Occupations. That the insured engages in an occupation more hazardous than that in which he is insured, does not entitle the insurer to an abatement of the award, in an action upon the policy, where it appears that the deceased accepted the more hazardous occupation temporarily, had already quitted it without any intention of returning to it, and his death occurred from causes having no relation to the more hazardous calling. *Midland Company v. Anderson*, 32.

LIMITATIONS.

Bill to Declare a Trust in a Decreed Appropriation of Water, is not affected by the provisions of secs. 3313, 3318 of The Revised Statutes. *Ullman v. Kelley*, 77.

LUNATICS.

Non-Resident—Ancillary Conservator. An ancillary conservator for a non-resident lunatic, was ordered, there being no reason for his continuance, to turn over the estate in his hands to the guardian appointed at the home of the lunatic. *Craig v. Dewey*, 362.

Expenditures by County for the support of Insane Persons are not provided for by Rev. Stat. sec. 4150. *Mulnix v. Denver*, 462.

Jurisdiction Over Estate.

See DISTRICT COURTS.

MANDAMUS.

When Allowed. The writ issues to an officer only when there is a clear legal right in the petitioner, and a clear legal duty to act on the part of the officer. The State Land Board offered for public sale only the surface of certain lands, reserving the mineral. This reservation was without authority of law. The application of the purchaser for mandamus to compel the conveyance both of the surface, and all below the surface, was denied, upon the ground that the State Land Board being without authority to sell the mere surface, the whole transaction was void. *Gunter v. Walpole*, 234.

The relator must show a clear, legal right in himself, and a plain legal duty resting upon the respondent. *Mulnix v. Denver*, 462.

MASTER AND SERVANT.

Duty of Master as to Appliances. It is the duty of an employer to exercise reasonable effort to keep in suitable condition for use the machinery and appliances used by his employees. *Rio Grande Southern Co. v. Campbell*, 217.

Railway Company, owes to its employees reasonable care to keep its rolling stock in reasonably safe condition. Inspection and tests must be made at proper intervals, and the company is bound to know the condition of its cars, so far as such inspection suffices. *Id.*

That the couplings, defect in which was alleged to have occasioned the injury, "looked all right" when the cars were taken into the train, and that no defect therein was manifest before the accident was held not to establish conclusively that the defect did not exist before the accident. *Id.*

Duty of Servant. A railway brakeman is not bound to go under the cars of a train upon which he is employed, in order to ascertain the condition of the couplings. A rule of the employer that the couplings "must be examined before the coupling is made," requires no such diligence on the part of the brakeman. *Id.*

Duty to Servant of Master Employing Electricity. One who sends to a place where the electric current is received and distributed a servant who has no special knowledge of electricity or electrical appliances, is bound to the highest degree of care, caution, and foresight consistent with the practical conduct of his operations, to avoid injury to such employee. The doctrine of the *Denver Company v. Simpson*, 21 Colo. 371, and the cases which follow it, is not to be so construed as to limit the duty in such cases to the public, at places away from the power station.

The evidence examined and held to convict the employer of negligence. *Arkansas Valley Co. v. Ballenger*, 548.

Miner Responsible for Condition of Room Where He works. A temporary track in a coal mine, used solely for the accommodation of the miners working in the room, for the removal of coal, is part of the place of work of the miner there employed, and he has no action against the master for injuries attributable to the dangerous condition of the place. *Calumet Co. v. Rossi*, 133.

MAXIMS.

No man may profit by his own wrong. Non-performance of a contract can not be asserted by one whose wrong occasioned the breach. *Burrell v. Masters*, 310.

MORTGAGE.

Parol to Establish. An absolute conveyance of land may be shown by parol to be intended to be a mere security; but the evidence must be clear, certain, unequivocal, and convincing. *Denver Sanitarium v. Roberts*, 60.

MUNICIPAL CORPORATIONS.

Railroad Grade in Street—Liability for Injury to Private Property. A city is not liable for an injury to private prop-

erty occasioned by a railway grade authorized by the city in a public street, even though attributable to the omission by the company to provide means of drainage as stipulated for in the ordinance authorizing such grade. *Luxford v. Denver*, 355.

Electric Light Works—Election to Authorize. At an election held under c. 153 of the Acts of 1899 (Rev. Stat. sec. 6525, cl. 67) only tax payers of the city are entitled to vote. A taxpayer of the county residing within the city, but paying no tax on property within the city, is not entitled to vote. *Loveland v. Western Co.*, 55.

NEGOTIABLE PAPER.

See BILL AND NOTES.

NEGLIGENCE.

Not Presumed. Plaintiff must make it appear by reasonably certain affirmative evidence, that the injury of which he complains was attributable to the negligence of his adversary. *Mountain Motor Co. v. Rivers*, 561.

From the mere occurrence of an accident. Conjecture is not to take the place of evidence. The evidence examined and held insufficient to warrant the judgment in favor of the plaintiff in the court below. *Denver & Rio Grande Co. v. Thompson*, 4.

Injury by Fire. Action for injury by fire attributed to the negligence of the defendant. The evidence examined, and held insufficient to support a verdict for plaintiff. *Mountain Motor Co. v. Rivers*, 561.

In Matters of Contract. The execution of a conveyance of lands is not, of itself, a bar to an action for its reformation. *Hitchens v. Milner*, 597.

Driver of Auto Car. The defendant driving an auto car upon a road with which he is acquainted, and ascending from the south a hill, the other activity of which is hidden from view, and knowing that travelers may be expected to be ascending the hill from the north, passes another auto car at great speed, shortly after commencing the descent, and failing to see one ascending from the north upon a motor cycle, collides with him, doing serious injury. Held a clear case of negligence. *Lesback v. Moore*, 315.

Pleading. Negligence may be alleged in general terms. Under such general allegation evidence of specific matter is admissible. If the defendant fails to move that the general allegation be made specific he will not be heard to complain of its generality. Action for injuries occasioned by the fall of plaintiff from a haystack, alleged to have been caused by the negligence of defendant "in the control, management, and operation of the haystacker." Evidence that one of the horses used in operating the stacker was not well broken held admissible. *Drake v. Slessor*, 292.

NEW TRIAL.

Newly Discovered Evidence—Diligence. One convicted of crime, and applying for a new trial on the ground of newly dis-

covered evidence, is not to be deemed negligent in not seeking for the evidence newly discovered from a witness who testifies upon his trial, and who was manifestly intent to clear herself of the same accusation, where the effect of the new evidence is to charge the witness. *Graff v. People*, 489.

Conflict in the Evidence. No ground for. *Brunton v. Stapleton*, 577.

NON-SUIT.

Motion for, admits every inference of fact that can be legitimately drawn from the plaintiff's evidence. *Love v. Cotten*, 593.

NOTICE.

Recorded Conveyance of Lands, is notice only as to the land therein described. As between an innocent purchaser for value, and one who has accepted a mortgage containing a false description the former is preferred. *Wedman v. Carpenter*, 63.

Possession of Lands, open and exclusive, is notice of the interest of the one in possession.

Possession of a Ditch and its Waters. The doctrine applies to an easement, e. eg., to a water right. The possession and use are deemed continuous, though the water is not applied during the winter season. That the water never was or could be applied to the land to which it was erroneously conveyed, might be sufficient to put subsequent purchasers of the land upon notice. *Hitchens v. Milner Co.*, 597.

PARTIES.

Necessary—At Law. Action upon promissory note by endorsee. The answer alleged that plaintiff held the notes merely for collection, and received them with full knowledge of facts set up in the answer showing want of consideration. *Held* that the payee named in the notes was not a necessary party. *Gibbs v. Security Bank*, 413.

Indispensable Parties. The trespasser who has wrongfully extracted ores from the properties of another, and delivered the same to a Refining Company, is not an indispensable party to an action by the owner against the Refining Company for the value of the ores; and his threats, from another jurisdiction, to hold the Refining Company responsible, and that the Refining Company may be harassed by such litigation, in another jurisdiction is immaterial. *American Co. v. Hicks*, 146.

Taber v. Bank of Leadville, 35 Colo. 1, and *Rumsey v. New York Life Company*, 50 Colo. 71, distinguished.

Substitution of Parties. The parties to a writ of error having stipulated that the writ should be discontinued, a third party interested in the controversy, was, upon its petition substituted. *Lockhard v. People*, 558.

Bringing in New Parties. Bill to establish title to an interest in water, for the irrigation of lands. Judgment for defendant upon a finding that plaintiff had disposed of his interest.

Plaintiff applying for a new trial, also asked leave to bring in as new parties defendant, the stockholders, defendant corporations which he alleged he had not been able to ascertain until they were disclosed by the secretary of the company. But the answer alleged that the stockholders of defendant were entitled to use and enjoy the waters claimed by plaintiff; and plaintiff did not then ask to be furnished the list of these stockholders, nor even ask that they be made parties, when later, during the hearing, their names were disclosed. Held that plaintiff having elected to try the action without bringing in the stockholders, was not entitled to complain of their absence, even if they were proper or necessary parties—as to which no opinion was expressed. *Reno v. Reno & Juchem Ditch Co.*, 80.

Stipulations—Effect. The parties to a litigation are not to stipulate away the rights of others having an interest in the matter in controversy. *Lockhard v. People*, 558.

PAYMENT.

Application of Payments. The general rule is that in the absence of a stipulation to the contrary, payments upon an account current are applied to the first items.

PLEADING.

Complaint. Upon an account, showing upon its face full payment of all that defendant promised to pay exhibits no cause of action. *Ady & Crowe Co. v. Howard*, 272.

Conclusions of Law. pleaded in the complaint are not to be taken as established facts, even though there be no answer. *Maxwell-Chamberlain Co. v. Piatt*, 140.

The complaint averred that a contract which was set out in *haec verba* was to be performed in Mesa County. There was nothing to this effect in the contract, and the proposition was denied by a motion to change the venue, supported by affidavit. Denial of the motion held error. *Id.*

Amendment. A party cannot by amendment relieve himself of admissions made in the original pleading. A complaint in an action up an account of a third person which the defendant had promised to pay, gave the items of the account, and by credits set down, showed full payment of all for which defendant was liable. An amended complaint omitting all items of the account occurring subsequent to the date of defendant's promise was held a mere subterfuge, and a demurrer thereto properly sustained. *Ady & Crowe Co. v. Howard*, 272.

Departure. Action Upon Contract. The complaint set up the legal effect of so much of the contract as the plaintiff relied upon. The answer set up other provisions of the contract, alleging noncompliance therewith by plaintiff. The reply assuming to respond to the new matters so asserted in the answer was not a departure. *Burrell v. Masters*, 310.

PLEADING AND EVIDENCE.

Recovery Allowed. only upon the allegations of the complaint. *Denver & Rio Grande Co. v. Thompson*, 4.

Evidence of the breach of a contract is not admissible where no contract is alleged. *Harogis v. Royal Fuel Company*, 416.

PRACTICE.

Objections to Evidence, must be made at the trial. First presented in the motion for a new trial they will be disregarded. *Messer v. The People*, 435.

Directed Verdict—Motion for—Effect. Where neither party requests the submission of any fact to the jury, each moving for a directed verdict, the decision of the trial court has the effect of a general verdict upon all the matters in issue. Upon error brought, the weight of the evidence is not considered. If there is any substantial evidence to support it, and no error in the admission or the rejection of testimony is discovered, the judgment is affirmed. *O'Brien v. Galley Stockton Co.*, 70.

Waiver. Error in vacating a judgment by default is waived by filing further pleadings, and proceeding to trial upon the merits. *McPhail v. Denver*, 578.

PRACTICE IN ERROR.

Presumption, that the court below disregarded incompetent evidence. *Bessemer Co. v. Oxford Co.*, 1. The plaintiff having been non-suited, the court of review, on error brought, assumes the truth of the evidence produced on his behalf. *Pearce v. Mountain States Co.*, 92.

A court of review in considering the sufficiency of the evidence will make all inferences fairly deducible from the evidence, to support the judgment. *Colorado Co. v. Denver Club*, 418.

What May be Assigned for Error. Instructions given, to which no objection was made or exception taken below, will not be considered. Nor will a question not presented by the pleadings, nor suggested at the trial. *Baldwin v. Scott*, 53.

An injured workman was allowed by the Industrial Commission \$8.00 weekly. He afterwards petitioned for an allowance in gross. The Commission denied this application, apparently under the belief that the allowance was not authorized by the statute, but declaring further that it was not "for the interest of the parties." On petition of the workman to the District Court the same view of the statute was entertained, and solely upon this ground the petition was denied. Held that the ruling of the court in the construction of the statute was subject to review, notwithstanding the finding of fact as to the interest of parties, by the Commission. *Karoly v. Industrial Commission*, 239.

Motion for a New Trial Indispensable. When the defeated party fails to apply for a new trial within the period prescribed by the Code (Sec. 218), and the eighth Rule of Practice, his writ of error will be dismissed. The statute is peremptory. Absence from the place of the sitting of the court at the announcement of the judgment, press of business, and inadvertance, afford no excuse for such omission. *Keenan v. Colorado Co.*, 113.

Error—Questions Considered. Matters alleged of which there is no evidence are not considered. *Denver Sanitarium v. Roberts*, 60.

Errors not Argued, will not be considered. *Riverside Co. v. Bijou District*, 184.

Decree Upon Conflicting Evidence, will not be reviewed. *Id.*

Bill of Exceptions. Rulings in the admission or exclusion of evidence, must, to avail the defeated party, be excepted to at the time, and preserved in a bill of exceptions. *Messer v. People*, 435.

Harmless Error. Action for negligence in operation of haystacker. Evidence was received that one of defendant's horses was young and not well broken. But the injury occurred by the breaking of a cable to the haystacker, and nothing done by the team could have had any effect in producing this fracture. The admission of the evidence was therefore held without prejudice to the defendant. So as to the admission of testimony as to the stakes by which the stacker was fastened to the ground. *Drake v. Slessor*, 292.

Where the jury are fully and fairly instructed, one or more paragraphs in the charge which cannot have misled the jury are harmless. *Id.*

An instruction not prejudicial to the plaintiff in error is harmless. *Van Straten v. Leftwich*, 468.

Party Bound by Position Below. A party will not be heard to complain of the exclusion of evidence which was rejected upon his own objection thereto. *Kendall v. Metroz*, 387.

Findings Below—Effect. Where the evidence heard below is a mere transcript of the testimony given at a former trial, the court of review is not concluded by the findings of the trial court. *Carlson v. Akeyson*, 35.

Verdict Upon Sufficient Evidence Will Not Be Disturbed. Action against a physician for neglect resulting in the death of the patient. Verdict for plaintiff. There being testimony to the effect that defendant had not exercised the care necessary, proper, and customary under the circumstances, the court refused to disturb a judgment for plaintiff. *Tadlock v. Lloyd*, 40.

Findings Supported by Evidence, will not be disturbed. *Snyder v. Hamilton Bank*, 24; *Reno v. Reno and Juchem Co.*, 78; *Tallman v. Huff*, 128; *Ziegler v. Corbin*, 138; *Lynch v. Union Pacific Co.*, 152; *Thomas v. Denver*, 155; *Colorado Springs, &c. Co. v. Kelley*, 246; *Kalberer v. Wilmore*, 411.

Findings on Conflicting Evidence, will not be disturbed. *Elwell v. Dickson*, 67; *Engelbach v. Kellog*, 182.

Finding on Insufficient Evidence. Where, disregarding incompetent evidence heard below, what remains in the record is insufficient to support the decree it will be reversed. *Bessemer Co. v. Oxford Co.*, 1.

Record—Indefinite and Unintelligible Testimony, Censured. Action for negligence in the installation and conduct of electric fixtures. Witnesses were permitted to refer to a diagram drawn upon a blackboard, and to testify that "from here to there," etc., without any identification of the points referred to. The court complained of the unnecessary labor cast upon it by this crude and shiftless manner of conducting matters in the court below. *Pearce v. Mountain States Co.*, 91.

PRECEDENTS.

Effect. Every judicial opinion is to be read in the light of the particular facts which the record presents. *Gunter v. Walpole*, 234.

PROCESS.

Service of Where Sheriff Party. Where the sheriff is a party to the cause all process therein must be served by the Coroner. (Rev. Stat. sec 1298.) Service of the summons by the sheriff is void. Even though the sheriff has no interest in the controversy, the result is the same. If a proper party, e. g., as trustee holding the legal title to the lands which are in controversy in the action he is disqualified. *Wise v. Toner*, 420.

Service of Summons, against a municipal corporation, upon another than the officer appointed by law to receive it, will not support a default. *McPhail v. Denver*, 578.

PROMISSORY NOTES.

See **BILLS AND NOTES.**

PUBLIC OFFICER.

Mileage to Public Officer. No official of the state except members of the Legislature, and no county officials, except the county commissioners, are entitled to an allowance for traveling expenses. *Leckenby v. Post Co.*, 443.

Salary—Unlawful Increase. The Constitution provides that the salary of the Lieutenant Governor shall not be increased during his official term. The officer keeping no books, records, or office, and having no duties to perform except to preside at the meetings of the Senate, held that an appropriation made by the Legislature to this officer, "for official or semi-official purposes," was void. *Leckenby v. Post Co.*, 443.

PUBLIC UTILITIES COMMISSION.

Powers. The statute (Laws 1913 c. 127) confers upon the commission exclusive jurisdiction to determine whether a railroad company may suspend service upon, and dismantle, a railway lying wholly within the state. Under the act of 1915 (Laws 1915 c. 134) the commission has the same control over a receiver of a railroad as over the railway company itself, before the appointment of a receiver. The ascertainment of the facts necessary to the just exercise of the powers conferred by the statute, and the exercise of judgment thereupon, is not the exercise of judicial power, and is in no sense an invasion of the Constitution. Teller and Bailey, J. J.'s, concur, solely upon the ground

that the District Court denied the application of the Attorney General to intervene in behalf of the people.

QUO WARRANTO.

Usurpation of the Franchise of an Irrigation District is a wrong which may be corrected by *quo warranto*.

Pleading. The complaint may be general in terms charging acts which show an intrusion into, or an usurpation of, an office or franchise. The defendant is then called upon to show his right. There is no reason why the allegations of the complaint should be more specific than at Common Law. *Lockhard v. People*, 558.

RAILWAYS.

Duty to Fence Track—Yard Limits. The yard limits of a railway station must be regarded as at least co-extensive with the sidetracks and switches existing and customarily used for the transaction of business at such station. Injury to an animal within such yard limits, no negligence of the railway employees being shown, affords no action. *Denver & Rio Grande Co. v. Siminoe*, 73.

Liability as Common Carrier of Goods. See COMMON CARRIER.

RULES OF COURT.

Effect. A rule of court cannot destroy a right nor impose burdens upon its exercise. *Drennan v. Johnson*, 381.

SALES.

Title Retained—Secret Lien—Effect. Sale of a silo, the written contract expressly stipulating that until full payment of the purchase price the title remains in the seller, that the annexation thereof to any lands of the buyer, shall not affect the right of the seller, and conferring upon the seller the right, in case of default, to retake the thing sold, is valid between the parties. The silo remains personal property. *Beatrice Creamery Co. v. Sylvester*, 569.

So even as to the prior mortgagee of lands upon which the silo was afterwards erected and affixed, where it may be removed without material injury to the land.

The mortgagee is not a third person within the meaning of Rev. Stat. Sec. 512. *Id.*

SOCIETIES.

Change of By-Law—Retro-active Effect. A change in the by-laws of a benefit society is not to be construed as operating retroactively, unless specifically extended to prior contracts. *Sawyer v. Headcamp Woodmen*, 522.

Religious Society—Call of Meetings. Sec. 865 of the Revised Statutes has no application to religious organizations. Their own rules and regulations control in the call of their meetings. *Uzzell v. McClelland*, 324.

SPECIFIC PERFORMANCE.

Contract to lend money will not be specifically enforced.
v. Fuller, 68.

STATUTES.

Construction. The Workmen's Compensation Act (Laws c. 179) is to be liberally construed. *Karoly v. Industrial mission*, 239; *Employers' Co. v. Industrial Commission*, 28.

Implications. Where a statutory provision is general, nothing necessary to make it effectual is supplied by implication.

The statute authorizing the sheriff to let an accused person bail upon his entering into a recognizance with one or more ties, by implication authorizes the sheriff to examine the property, or take from them affidavits as to their property. *People v. Pollock*, 275.

STATUTES CONSTRUED, CITED OR REFERRED TO.

Revised Statutes 1908, sec. 340, *O'Brien v. Galley-Stockton*, 70.

Revised Statutes 1908, sec. 512, *Beatrice Co. v. Sylvester*,

Revised Statutes 1908, sec. 772, *Moody v. People*, 339.

Revised Statutes 1908, sec. 1298, *Wise v. Toner*, 420.

Revised Statutes 1908, sec. 1538, *Drennan v. Johnson*, 382.

Revised Statutes 1908, sec. 1539, *Gibbs v. Security Bank*,

Revised Statutes 1908, sec. 1629, *Sevilla v. People*, 437.

Revised Statutes 1908, sec. 1675 *Sloan v. People*, 456.

Revised Statutes 1908, sec. 1766, *Schell v. People*, 116.

Revised Statutes 1908, sec. 1849, *Tracy v. People*, 232.

Revised Statutes 1908, sec. 1947, *People v. Pollock*, 277.

Revised Statutes 1908, sec. 1950, *Highley v. People*, 497.

Revised Statutes 1908, sec. 2589, *Williamson v. Fleming*, 5.

Revised Statutes 1908, sec. 2926, *People v. Henwood*, 566.

Revised Statutes 1908, sec. 3202 *Larimer & Weld Co. v. People*, 320.

Revised Statutes 1908, sec. 3450, *Interstate Co. v. Steele*, 10.

Revised Statutes 1908, sec. 3454, 3457, *Chicago, &c. Co. v. Patterson*, 536.

Revised Statutes 1908, sec. 3459, *Ibid.*

Revised Statutes 1908, sec. 3460, *Ibid.*

Revised Statutes 1908, sec. 3463, *Interstate Co. v. Steele*, 1.

Revised Statutes 1908, sec. 4150, *Mulnix v. Denver*, 462.

Revised Statutes 1908, sec. 4567, *Emerson-Brantingham Co. v. German Co.*, 398.

Revised Statutes 1908, sec. 4570, *Ibid.*

Revised Statutes 1908, sec. 4671, *People v. Pollock*, 277.

Revised Statutes 1908, sec. 5750, 5754, *First Natl. Bank v. Patterson*, 166, 175.

Revised Statutes 1908, sec. 6153, *Leckenby v. Post Co.*, 44.

Revised Statutes 1908, sec. 7254, *In re Estate Brown*, 341.

Revised Statutes 1908, sec. 7267, *Galvin v. Brewster*, 407; *v. Cotten*, 596.

Revised Code, sec. 21, *First National Bank v. Patterson*, 1.

Revised Code, sec. 75, *Bessemer Co. v. West Pueblo Co.*, 26.

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Revised Code, sec. 218, *Keenan v. Colorado*
Revised Code, sec. 331, *State Medical Exam*
Laws 1891, p. 386, *Loveland v. Western Co.*
Laws 1899, c. 153, *Ibid.*
Laws 1907, c. 149, *In re Songer*, 460.
Laws 1909, c. 213, *Loveland v. Western Co.*,
Laws 1909, c. 147, *Leckenby v. Post Co.*, 44
Laws 1911, c. 135, *Denver Co. v. Siminoe*, 74.
Laws 1911, c. 216, *First National Bank v. Pat*
Laws 1913, c. 127, *People v. Colorado, &c. Co.*
Laws 1915, c. 179, *Karoly v. Industrial Comm*
Laws 1915, c. 173, *In re Estate of Brown*, 34
Laws 1915, c. 109, *Henrylyn District v. Patter*
Laws 1915, c. 123, *Gregg v. People*, 390.
Laws 1915, c. 98, *Noble v. People*, 509.

STATUTE OF FRAUDS.

Agreement of grantor of a water right to prote
adjudicating proceedings, and secure a decree
right, is validated by past performance. *Wilma*.

Pleading. It was contended that a parol gift o
lands was void by the Statute of Frauds. The s
ing been pleaded, the question was not consider
Metroz, 387.

STREET RAILWAY COMPANY.

Negligence in Operation. Where one operating :
upon the streets of a city fails to give any warni
as he approaches a street crossing, or to look in
in which he is moving, he is guilty of inexcusable
Colorado Springs Co. v. Kelley, 246.

TAXATION.

Due Process of Law. Where the statute authorize
board or other agency, meeting at specified times :
to increase or decrease by such rate per cent., or a
aggregate valuation of properties made by the loc
ities for the purpose of taxation, as will place such p
the assessment roll at its full cash value, and requires
ing board to complete its labors within specified dat
is afforded to all persons who may be affected by the
such board; and a property owner who remains inact
the work of the board is completed, and the tax laid,
be heard to afterwards apply for a rebate. *First Nation*
v. Patterson, 166.

Dam of Reservoir. The dam of a reservoir collecting an
ing water for irrigation is not taxable.

A judgment approving the assessment thereof as in fact
sold water rights, not sustained by the evidence, but ba
mere conjecture, reversed. *Antero, &c. Co. v. Park Count*
Illegal Tax, may be recovered from the county, under Rev
Secs. 5750.

Sec. 5 of c. 134, Laws 1913, does not take away the tax
right of action. Its effect is to take from the county comm

ers the power to refund the tax, without the approval of the commission, or the judgment of some court of competent jurisdiction that the tax is illegal. *First National Bank v. Patterson*, 166.

National Bank—Failing to file a list of its shareholders the county treasurer, as required by Rev. Stat. sec. 5754, is liable for the tax assessed upon its stock. *First National Bank v. Patterson*, 166.

Irrigation District Taxes—*District Coupons*. Coupons for the bonds of an irrigation district are a lawful tender for the district tax levied for the year in which such coupons mature, but which tax is collected in the year next succeeding. *Chas. Title & Co. v. Patterson*, 534.

Tax Sale—*Effect*. Lands sold for taxes, are not to be redeemed for a subsequent default, until by redemption or sale or certificate the county is made whole. *Henrylyn District v. Patterson*, 386.

TAX COMMISSION.

Increase in Valuation—*Discrimination*. An increase in the valuation of certain properties made by the county assessor does not require an increase in other properties of the same class, made by the commission itself. To omit it is not discrimination.

So of a failure to make increase in the valuations made by the assessor in other counties. *First National Bank v. Patterson*.

TRESPASS.

Liability, for is joint and several. *American Co. v. Hicks*.

TRIAL.

Questions for Court. The construction of a contract, if ambiguous, is for the court; to submit it to the jury is error. *Western Colorado Co. v. Gibson Co.*, 288.

Instructions. Where the plaintiff is entitled to recover upon the theory that a contract in writing was modified by a subsequent agreement in parol, the jury should be specifically so instructed. *Id.*

Questions for Jury. In an action against a physician for negligence resulting in the death of the patient, the question whether the negligence was the proximate cause of the fatal result is for the jury.

Testimony examined and held sufficient to sustain the verdict. In considering this question the difficulty of procuring positive testimony as to the cause of death, that the code of ethics of the medical profession is frequently a bar to the securing of such testimony, is to be borne in mind. *Tadlock v. Lloyd*, 4.

Action against a telephone company for the destruction of a patron's property, attributed to negligence in the installation of its system in the patron's premises. Whether defendant is guilty of negligence in not adopting the most approved method

INDEX.

construction and maintenance, and whether such negligence was an efficient cause of the injury, are questions for the jury.

So whether the company knew, or by reasonable diligence should have known, of a change in conditions in the premises, had reasonable time to effect any improvements or repairs, or made necessary by reason of such change. *Pearce v. States Co.*, 91.

Fair Trial. Defendant cannot be heard to complain that plaintiff was permitted to examine witnesses as to a matter in which he himself was permitted to go at length. *Naughton v. McNulty*, 176.

TORTS.

Joint Torts. An injury occasioned by the joint acts of two irrigating companies in attempting to convey an excessive quantity of water in a natural stream, charges each and all of the defendants. *Larimer & Weld Co. v. Walker*, 321.

TRUSTS.

Evidence to Establish. Statements of the beneficiary of a life policy that she intends to apply the proceeds to the benefit of her children are not sufficient to establish a trust in such proceeds.

Conversations of the beneficiary in a life policy with her husband, alleged to have occurred long before the trial, and the accuracy of which depends on the recollection of the witness, are not sufficient to establish a trust in the proceeds of such policy, but may be considered in connection with other evidence to show a trust previously created by the insured.

The proceeds of the policy are a property right in the beneficiary therein, and a trust in such proceeds in favor of a third party must be established beyond a reasonable doubt. *Fee v. Fee*, 1.

VENDOR'S LIEN.

Waiver of. One having a vendor's lien upon real property for the purchase money thereof does not lose the lien by releasing the personal liability of the endorser of the obligation by the purchaser. *Yates and McClain Co. v. El Paso*, 1.

VENUE.

Action for Tort. Action for fraud in procuring an assignment of lands. The lands parted with by defendants, and the false representations were alleged, were situated in Mesa County. All parties were residing in Denver at the time of the transaction, and at the institution of the plaintiffs' action to change the venue to Arapahoe, denied. *Carlson v. Carlson*, 11.

Place of Performance of Contract. Defendant, a corporation whose principal place of business and principal office was in Denver, entered into a contract with plaintiff, who was in Mesa County, to the effect that it would sell and deliver to plaintiff, at Denver, certain motor cars, and granted to plaintiff the exclusive right to sell these cars in specified counties of the State of Colorado. Plaintiff agreed to deposit a sum specified in the contract with defendant. *Plaintiff v. Defendant*, 1.

defendant, as a guarantee, to be refunded at the expiration of the contract, if plaintiff had faithfully discharged his obligations thereunder. Save as above set forth there was no express provision as to where anything was to be done by defendant under the contract. Action in Mesa County to recover the deposit. *Held* that the contract was to be performed in Denver and defendant was entitled to change of venue to that court. *Maxwell Chamberlain Co. v. Piatt*, 141.

WATER RIGHTS.

Appropriation—Reasonable Diligence. Reasonable diligence in the work of appropriation depends upon the facts of the particular case, the nature and conditions of the region, the magnitude and difficulties of the work, the labor supply, and length of the season in which work is practical. (Scott, *Riverside Co. v. Bijou District*, 184.

Possession—Effect. After the purchaser of a water right has long been in possession under an informal writing, the informality cannot be urged against his right. *Love v. Cotten*, 1.

Equity In. An appropriator who has conveyed an interest in his water right to another, induces his grantee to rely upon his promise to protect him in adjudication proceedings, and secures a decree establishing his right. Equity will declare a trust in the water right, to the extent of the interest so conveyed, as against a purchaser from such original appropriator, taking with notice. *Ullman v. Kelley*, 77.

Adjudication of Priorities—Special Proceeding. An appropriator who is diligently proceeding to complete an inchoate right to the use of water is not required to assert his claim in a special proceeding, instituted by another appropriator solely to adjudicate his own right. *Trowell Co. v. Bijou District*, 202.

Amendment of Record—Limitation. An action brought to correct a clerical error in the record of an adjudication decree, in which it appears that priority was awarded as of a date year prior to that anywhere claimed by the appropriator, in the adjudication proceedings, is not barred by the four years limitation (Rev. Stat. sec. 3313). *Bessemer Co. v. West Pueblo Co.*, 258.

Adjudication Decree, cannot determine the title to a ditch, but only the right to enjoy the waters thereof, but only the relative priorities of the different ditches in respect of priorities are claimed. *Love v. Cotten*, 593.

Adjudication of Priorities—Conditional Decree, awarding the appropriator a specified volume of water, without prejudice to a larger appropriation, upon evidence of the future application of the increased volume to beneficial uses, within a reasonable time, approved. The right of the appropriator to the increased volume upon compliance with the decree relates to the beginning of his work.

Delays in the Application of the Water to Beneficial Use. Where the junior appropriator asserts that by delays in the completion of his works, the senior appropriator has lost his priority he must show that his own appropriation was initial.

and work commenced thereunder, during such delays. *Trowell Co. v. Bijou District*, 202.

Delay in Performing Condition. By a general adjudication decree certain appropriators were awarded priority to a certain volume of water, absolutely, and to an additional volume, upon condition that with reasonable diligence they should bring under irrigation the residue of the land, the irrigation of which was proposed. After the expiration of ten years, their successors in title, having complied with this condition, applied for an order making absolute the conditional features of the decree. They were opposed by the defendant, a later appropriator, who contended that by reason of the long delay of plaintiffs, and their predecessors in title, they should, in any enlargement of the decree be subordinated to him. But defendant had never made any use of the water until the petitioners or their grantors had begun to bring the additional lands under cultivation. *Held* that, as to the defendant, there had been no abandonment of the right granted by the original decree. *Schwartz v. King*, 48.

Application of Water Awarded Conditionally—Reasonable Diligence. What constitutes diligence varies with circumstances and the lands not under irrigation at the date of the original decree, and being practically deserted, while in the hands of trustees and assignees, during the years of delay, the court applied the doctrine of *Weldon Company v. Farmers' Company* and *Conley v. Dyer*, 43 Colo. 22, and refused to disturb the finding of the court below in favor of petitioners. *Id.*

Negligence in Completion of the Work. The appropriator for several years failed to carry on its work for the diversion of the water and its application to beneficial uses. Its appropriation was dated from the resumption of activity. *Antero &c. Co. v. Ohler*, 161.

Garrigues, J., Dissented upon the ground that the delays were excused by the magnitude and difficulties of the work, the death of one of the active parties, and the financial stringency attending the panic of 1893.

Change of Place of Storage. An irrigation company applying for leave to change the place of storage of certain waters which have been adjudged to it, has the burden of showing that no substantial invasion of the rights of others will result from the proposed change.

Where the testimony is in conflict an order denying the application will be affirmed. *Water Supply Co. v. Larimer & Weld Co.*, 504.

Change of Point of Diversion. There being no evidence that others would be injuriously affected by the change sought, a decree denying it was reversed and the court below directed to order it. *Bessemer Co. v. Oxford Co.* 1.

Seepage. A ditch which collects seepage and conveys it to the stream is regarded as a natural water course. *Trowell Co. v. Bijou District*, 202.

The doctrine of *Comstock v. Ramsey*, 55 Colo. 244, is not confined to the case where the seepage in question has not yet reached the stream. It extends to escaped water which will

naturally, and in the course of time reach the stream from which it was diverted. *Id.*

Reservoirs—Right of Owner as to Seepage Therefrom. The owner of a reservoir may construct a ditch and drain the water from which the seepage from his works has injured but this gives him no right to the seepage, if the water so collected may be made to return to the stream. *Id.*

And the owner of a reservoir who contributes to the creation of a ditch for the collection of his seepage, merely by bringing an action by the owner of lands damaged thereby against him, is not right in the seepage so collected. *Id.*

Relation. Where even after inexcusable delay in the application of the water to beneficial use the appropriator commences work before the right of any third person has intervened, he proceeds diligently to its completion and use, his right to the initiation of his appropriation. *Trowell Co. v. District, 202.*

Limitations. The limitations prescribed by Rev. St. 3338 apply only as against a final and absolute decree. *v. Bijou District, 202.*

Officers of the Water Service—Jurisdiction to Control. The District Court of one county has no jurisdiction to control the officers of the water service in the administration of a ditch located in another county; the ascertainment and distribution of the priorities therein is vested by statute in the District Court of such other county. *Trowell Co. v. Bijou District, 202.*

See IRRIGATION.

WORDS.

Papinger, who is. *United States Co. v. Ellison, 253.*

Month, is always taken to refer to the current year unless the contrary appears from the connection.

The rule applies even in the trial of one accused by a jury. *Myers v. People, 450.*

Wages, in common usage imports the compensation of free laborers and domestic servants only.

A municipal ordinance prescribed the fee to be charged for employment agency, as a certain per cent of "one month's salary and board." Held not to be applied to those seeking clerical positions. *Wilson v. Denver, 484.*

WORKMEN'S COMPENSATION LAW.

Claim Under. Merely addressing a letter to the Coroner stating the death of the writer's husband, and that she was entitled to compensation, is not a claim under the statute, but it has the effect to deprive the writer of her action against a culpable employer. *Arkansas Valley Co. v. Ballinger, 502.*

Pleading. An employer charged with the death of an employee, attributed to his negligence, must if he would as the plaintiff presented a claim to the commission, answer her action, plead that the deceased employee or the employer himself, was, at the time of the accident, subject to the provisions of the Workmen's Compensation Act. *Id.*

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